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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 42

JAMES D. SMYTH, EXECUTOR OF THE ESTATE OF JAMES J. RANSOM, DECEASED, PETITIONER

v.

THE UNITED STATES

No. 43

THE DIXIE TERMINAL COMPANY, PETITIONER

v.

THE UNITED STATES

No. 198

THE UNITED STATES, PETITIONER

v.

ARTHUR W. MACHEN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT IN NOS. 42 AND 43, AND PETITIONER IN NO. 198

OPINIONS BELOW

The opinion of the Court of Claims in *Smyth* v. *United States* (No. 42) is not yet reported (R. 19–25).

The opinion of the Court of Claims in *Dixie Terminal Co.* v. *United States* (No. 43) is reported in 83 C. Cls. 656 (R. 14–17). The motion of the Dixie Terminal Company for a new trial and the motion of the United States for amendment of the special findings of fact were overruled without written opinion (R. 18).

The memorandum opinion of the District Court of the United States for the District of Maryland *in United States* v. *Machen* (No. 198) is not reported (R. 14). The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 27–32) is reported in 87 F. (2d) 594. The petition of the United States for a rehearing was denied without written opinion (R. 33).

JURISDICTION

The judgment of the Court of Claims in the *Smyth* case (No. 42) was entered May 3, 1937 (R. 25). The petition for a writ of certiorari was filed May 7, 1937, and was granted June 1, 1937.

The judgment of the Court of Claims in the *Dixie Terminal Co.* case (No. 43) was entered November 9, 1936 (R. 18). A motion for a new trial was overruled February 8, 1937 (R. 18). The petition for a writ of certiorari was filed May 7, 1937, and was granted June 1, 1937.

The judgment of the United States Circuit Court of Appeals was entered January 15, 1937 (R. 32). The petition of the United States for rehearing

was denied April 6, 1937 (R. 33). The petition for a writ of certiorari was filed July 6, 1937, and was granted October 11, 1937.

The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939; and on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, 939.

QUESTION PRESENTED

Whether the plaintiffs, as owners of Liberty Loan Bonds which have been the subject of a notice of call for redemption, are entitled to recover the amount of an interest payment for a period subsequent to the date of redemption designated.

STATUTES INVOLVED

The pertinent provisions of the Act of April 24, 1917 (40 Stat. 35), and of the Act of September 24, 1917 (40 Stat. 288, as amended), pursuant to which the First and Fourth Liberty Loan Bonds involved herein were issued, are printed, *infra*, pp. 48, 49. These cases may be said, in addition, to involve the monetary legislation of Congress in 1933 and 1934, particularly that legislation which is concerned with the regulation of the value of all coins and currency, with "gold clause" obligations, and with the restrictions upon the use of gold coin.

Act of May 12, 1933, c. 25, 48 Stat. 31, 51–53;

Public Resolution No. 10, approved June 5, 1933, c. 48, 48 Stat. 112;

Gold Reserve Act of 1934, approved January 30, 1934, c. 6, 48 Stat. 337.

STATEMENT

No. 42

The petitioner in No. 42 as executor is the owner of a $10,000 First Liberty Loan 3½% Bond of 1932–1947, serial number 6670. This bond was issued pursuant to the Act of April 24, 1917 (40 Stat. 35) and Treasury Department Circular No. 78, dated May 14, 1917 (R. 7–8), and was purchased by the petitioner in December 1934 for the sum of $10,362.50 and accrued interest (R. 16). The bond (R. 5–7) in part provides:

> The United States of America for value received promises to pay to the bearer the sum of Ten Thousand Dollars on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, * * *. All or any of the bonds of the series of which

> this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. * * * From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. * * *

Department Circular 78 in part provided:

> The bonds will be dated June 15, 1917, and will bear interest at the rate of 3½ per centum per annum from that date, payable semiannually on December 15 and June 15. The bonds will mature June 15, 1947, but the issue may be redeemed on or after June 15, 1932, in whole or in part, at par and accrued interest, on three months' published notice, on any interest day; in case of partial redemption the bonds to be redeemed to be determined by lot by such method as may be prescribed by the Secretary of the Treasury.

On March 14, 1935, the Secretary of the Treasury published a notice of call for the redemption on June 15, 1935, of First Liberty Loan bonds of 1932–1947 (R. 9). This notice of call provided in part as follows:

Public notice is hereby given:

1. All *outstanding First* Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. The various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932–47 (First 3½'s), dated June 15, 1917; * * *

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.

On April 22, 1935, the Secretary of the Treasury issued Department Circular No. 535, which contained the above mentioned notice of call, and prescribed rules for the redemption of First Liberty Loan bonds. This circular (R. 10–14) contained the following language:

III. *Rules and regulations governing redemption of First Liberty Loan bonds*

Pursuant to the call for redemption, as set forth in Section I of this circular, the following rules and regulations are hereby prescribed to govern the presentation and surrender of First Liberty Loan bonds for redemption on June 15, 1935:

1. *Payment of called bonds on June 15, 1935.*—Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on

June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds.

The First Liberty Loan bond owned by the petitioner is one that was included in the above notice of call for redemption.

On December 28, 1935, the petitioner presented the bond to the Treasurer of the United States and demanded the redemption of the bond by payment of 10,000 gold dollars, each containing 25.8 grains of gold, .9 fine. This demand was refused by the Treasurer, but the petitioner was offered payment of the dollar face amount of the principal of the bond in legal tender coin or currency. Petitioner refused to accept such legal tender coin or currency and retained the bond (R. 17).

Thereafter, on the same day, petitioner presented to the Treasurer of the United States the interest coupon for the six months' period June 15 to December 15, 1935, and demanded payment thereof in the sum of $175 in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond had been called for redemption on June 15, 1935 (R. 17).

Petitioner did not on December 28, 1935, or at any time hold a Federal license to acquire, hold, or dispose of gold coin or gold bullion, and was not engaged in any business in which the use of gold coin or gold bullion was necessary (R. 18).

The petitioner purchased this bond from a bank, and payment therefor was effected by entering a debit against petitioner's account with that bank in a dollar amount equal to the purchase price (R. 16). Had the petitioner on December 28, 1935, when he presented the bond to the Treasurer of the United States for payment, received ten thousand dollars in gold coin, it was his purpose and intention to send the gold coin to this bank as a *routine deposit* for which he would have received in his dollar account a credit of $10,000 (R. 16).

On December 28, 1935, and thereafter, petitioner owed no obligation and incurred no expenses which could not have been liquidated in legal tender currency other than gold coin, and there was no investment which petitioner might have made in the United States with $10,000 in gold coin that he could not equally as well have made with $10,000 in legal tender currency (R. 18–19).

No. 43

The petitioner in No. 43 is the owner of a $50 Fourth Liberty Loan 4¼% bond of 1933–1938, serial number A00055321. This bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288), as amended, and Treasury Department Circular No. 121, dated September 28, 1918, and was purchased by the petitioner on March 9, 1935, eleven months after the date of redemption as hereafter set forth, for the sum of $51.75 and

accrued interest (R. 11). Payment was made for the bond by New York draft payable in dollars (R. 11). The price paid was in excess of the market value of the bond, which was par (R. 11). The bond (R. 5–6) in part provides:

> The United States of America for value received promises to pay to the bearer the sum of—Fifty Dollars—on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum, from the date hereof, on April 15 and October 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons as they severally mature, * * *. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933–1938 authorized by an act of Congress approved September 24, 1917, as amended, and issued pursuant to Treasury Department circular No. 121, dated September 28, 1918, to which reference is hereby made for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed, at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest, as in said circular provided. * * *

Department Circular No. 121 (R. 6–7) in part provided:

> The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease.

On October 12, 1933, the Secretary of the Treasury published a notice of call for the redemption on April 15, 1934, of certain Fourth Liberty Loan 4¼% bonds of 1933–1938 (R. 8–9). This notice of call provided in part as follows:

> Public notice is hereby given:
>
> 1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ per cent bonds of 1933–1938, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury,

are called for redemption on April 15, 1934, as follows:

All outstanding permanent coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1, such serial numbers being prefixed by a corresponding distinguishing letter J, K, or A, respectively; * * *

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934.

On October 12, 1933, the Secretary of the Treasury issued Department Circular No. 501, which contained the above-mentioned notice of call, and prescribed rules for the redemption of Fourth Liberty Loan bonds. This circular (omitted from the record) contained the following language:

IV. *Rules and regulations governing redemption*

Pursuant to the call for partial redemption, as set forth in Section I of this circular, the following rules and regulations are hereby prescribed to govern the surrender of Fourth 4¼'s called for redemption on April 15, 1934:

1. *Payment of called bonds on April 15, 1934.*—Holders of any outstanding Fourth 4¼'s included in the call for partial redemption on April 15, 1934, will be entitled to have their bonds redeemed and paid at par on April 15, 1934, with interest in full to that date. After April 15, 1934, interest

will not accrue on any bonds included in the call for partial redemption.

The Fourth Liberty Loan bond owned by the petitioner is one that was included in the above notice of call for redemption.

On March 11, 1935, two days after the purchase of the bond (R. 11, 13), the petitioner presented it to the Treasurer of the United States and demanded the redemption of the bond by the payment of 50 gold dollars, each containing 25.8 grains of gold, .9 fine. This demand was refused, but the respondent was ready and willing to make full payment at par in coin or currency of the United States legal tender (R. 13). Petitioner, thereupon, refused to accept payment for the bond at par in legal tender currency and retained the bond (R. 13).

Thereafter, on the same day, petitioner presented to the Treasurer of the United States the interest coupon for the six months' period ending October 15, 1934, and demanded payment thereof in the sum of $1.07 in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond had been called for redemption on April 15, 1934 (R. 13). This suit was filed the same day.

Petitioner was not engaged or authorized to engage in any business in which gold coin or gold bullion was necessary for its operation (R. 11). On March 11, 1935, it held no license authorizing

it to receive or hold gold coin or gold bullion (R. 13).

No. 198

The respondent in No. 198 is the owner of a $1,000 First Liberty Loan 3½% bond of 1932–1947, No. 47084, purchased on March 22, 1933, for $1,011.25 (R. 19). This bond was issued and called for redemption under the same circumstances as the First Liberty Loan 3½% bond of 1932–1947 involved in case No. 42 (R. 13–18).

The respondent did not surrender or offer to surrender or present for payment his bond, but it has been stipulated that upon proper presentation and surrender of all First Liberty Loan 3½% bonds the United States redeemed them by the payment of legal tender currency equal to the face amount of the bonds and that the Treasury Department refused to pay gold coin therefor (R. 11).

The *interest coupon in controversy* in the sum of $17.50 was *not* surrendered *or* presented for payment but it has been stipulated that the payment of similar interest coupons has been refused by the Treasury Department (R. 11).

The respondent held no license to acquire, transport, melt or treat, import, export, or earmark or hold in custody for foreign or domestic account, gold in any form on March 6, 1933, *or* at any time subsequent to that date (R. 10).

These three suits, Nos. 42, 43, and 198, were brought to recover upon alleged interest obligations

for the six months' period following the dates designated for the redemption of the bonds. In No. 42 suit was instituted in the Court of Claims on December 31, 1935, and judgment was rendered against the petitioner on May 3, 1937. In No. 43 suit was instituted in the Court of Claims on March 11, 1935, and judgment was rendered against the petitioner on November 9, 1936, and a motion for a new trial was overruled on February 8, 1937. In No. 198 suit was instituted in the District Court of the United States for the District of Maryland on December 30, 1935, and judgment was entered against the respondent on June 23, 1936, but this was reversed by the United States Circuit Court of Appeals for the Fourth Circuit on January 15, 1937. A petition for rehearing was denied on April 6, 1937.

SPECIFICATION OF ERRORS TO BE URGED IN NO. 198

The United States urges that the Circuit Court of Appeals for the Fourth Circuit erred:

1. In failing to hold that the principal of the bond became payable on June 15, 1935, the date designated in the notice of call for redemption, and that the Government's obligation to pay interest then ceased.

2. In holding that the notice of call for redemption was not sufficient to stop the running of interest on the bond after June 15, 1935, the date designated in the notice of call for redemption.

3. In holding that respondent, who at no time has held a license to acquire, hold, or deal with United States gold coin, was entitled to recover interest after the date designated in the notice of call for redemption.

4. In reversing the judgment of the District Court and holding that the respondent was entitled to recover.

SUMMARY OF ARGUMENT

I

The bondholders rest their case upon a contractual obligation. By the terms of the agreement between the parties the obligation to pay interest upon the bonds was specifically to cease upon the issuance of a public notice calling the bonds for redemption and the passage of time to the date designated in such notice. Since this condition has occurred the contractual obligation of the Government to pay interest has terminated.

The issuance of a notice of call for redemption in the usual form, operated to create, and was intended to create, the same right to payment assured by the bonds themselves. That the call was effective to entitle the bondholders to demand payment of the principal amounts of their bonds is established by the decision in *Perry* v. *United States*, 294 U. S. 330. By the same token the call was effective to terminate the obligation to pay interest. The suggestion that the bondholders may have an option to demand payment of the principal or to

sue for interest has no basis in the contract and, if accepted, would introduce confusion in public and private finance. Termination of the obligation to pay interest was not conditioned upon actual performance of the principal obligation. Imposition of this additional condition by implication would be unwarranted by judicial authority and would defeat by indirection the rule that interest is not allowed on claims against the Government in the absence of specific statutory authorization.

The terms of the Acts of Congress pursuant to which the bonds were issued, as well as the bonds themselves, establish the authority of the Secretary of the Treasury to issue the notice of call which terminated the obligation to pay interest. This authority has been recognized and confirmed by other legislation of the Congress.

The Act of March 18, 1869, does not affect the validity of the calls for redemption. Examination of the purposes and circumstances surrounding the enactment of that statute establishes that it was intended to apply only to Government bonds then outstanding and that it ceased to have significance when the Government, in 1879, resumed specie payments on its United States notes and maintained all coins and currencies at a parity of value. Even if the validity of the calls for redemption here involved were to be tried by the requirements of that Act, however, the conclusion would be compelled that these requirements have been fully met.

II

The contention that the United States has failed to tender the performance due under the bonds appears to rest exclusively upon its refusal to make payment in gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." For a double reason this contention cannot be supported. The gold clause in the plaintiffs' bonds is not a promise for payment solely in gold coin, but a promise to pay the value of gold coin. *Perry* v. *United States, supra.* Under the *Perry* decision, no claim of breach of the bond is maintainable which does not allege and prove also a failure to pay the equivalent in value of the gold coin. Even if the gold clause could properly be construed as promising payment in gold coin itself, however, the *Perry* decision does not warrant an assumption that the failure to make such payment, under the circumstances there and here presented, would constitute a breach of obligation. The power of the Congress to prohibit payment of gold coin from the Treasury is an essential aspect of its power "to deal with gold coin as a medium of exchange", and has received ample recognition in the decisions of this Court.

Even if the bondholders were in a position here to urge that the failure of the United States to pay them a number of dollars in legal tender currency in excess of the face amount of the bonds consti-

tuted a breach of contract, no such contention would be tenable. The assertion of the Circuit Court of Appeals in No. 198 that the dollars stated in the bonds were each "worth" 1.69 dollars in legal tender currency is in direct conflict with the decision of this Court in *Perry* v. *United States, supra,* which flatly rejected any method of computing equivalence or worth mathematically, in accordance with the ratios of the statutory gold content of the past and present dollars, regardless of actual loss. The maintenance of all forms of money at a parity in the economy of the country, this Court there held, precluded such a method of computation.

III

Nothing short of a position of material and present default on the part of the United States would in any event warrant the effort here made to work a forfeiture of the option of redemption. So long as the bondholders have been tendered the substantial equivalent of the performance due, no equitable ground can be urged for disregarding the express terms of the bonds and of the calls for redemption. Nor do intimations that the position of the United States, which under the circumstances now existing has been held to be correct, might under different circumstances be incorrect, afford a ground in these cases for forfeiture of its option of redemption. In claiming such a forfeiture, the bondholders are, in effect, insisting

upon payment of an uncontemplated premium, consisting of the added capital value of their bonds under present rates of interest. Acceptance of their contention would jeopardize huge savings of interest effected by refunding operations in recent years. In thus interfering with the sound administration of the public debt, it would tend to restrict the very power which—in the opinion in the *Perry* case upon which the bondholders rely—it was deemed necessary to protect.

IV

The bondholders misinterpret the statements in the opinion delivered by the Chief Justice in the *Perry* case reflecting upon the constitutionality of the Joint Resolution of June 5, 1933. If those statements mean that borrowing contracts of the United States may not in any fashion be affected by a subsequent exercise by Congress of the monetary power, they should be reconsidered, since by the settled doctrines of this Court they were not made under such circumstances as to constitute a precedent. The principle that governmental action taken in pursuance of sovereign governmental powers may affect rights arising out of transactions entered into between the Government and private individuals may justly be considered a postulate of American public law. It seems clear, however, that the statements in question were made in answer to a contention, which the Government

was understood as making, importing that Congress is free to disregard the obligations of the Government at its discretion. The Government is bound, under the law, upon its contracts as individuals are bound. Far from asserting that Government contracts may not be affected as individual contracts are affected by a subsequent exercise of general legislative power, the opinion delivered by the Chief Justice recognizes and reaffirms the principle that they may be so affected

ARGUMENT

To the extent that these cases may involve a constitutional question, they present the problem of harmonizing two great constitutional powers of the Federal Government—the power to regulate the monetary system and the power to borrow money. So much was broadly true also in *Perry* v. *United States,* 294 U. S. 330. But these cases present a further and significant aspect of the borrowing power not there involved—namely, the power to manage the public debt. The preliminary questions of the law of contracts here raised—of the construction and operation of redemption provisions common to both public and private long-term obligations—themselves involve conclusions of the utmost importance to that power.

These issues both of contract and of constitutionality must of necessity be viewed in the context of relevant considerations of national policy. The

factual and economic background of the Government's exercise of control over gold which is here involved was fully presented to this Court in the "gold clause" cases. The importance of the considerations which motivated the Government's action was there recognized, and the authority of the Government to exercise such control was broadly sustained. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 295–297, 302–306, 311–316; *Nortz* v. *United States*, 294 U. S. 317, 327–330; *Perry* v. *United States, supra*, at pp. 354–358. The important considerations which make the power of the Government to call its obligations for redemption prior to maturity (the exercise of which power is challenged by these bondholders) essential to the proper management of the public debt, however, were not presented or considered in those cases. Accordingly, the Government believes it desirable to outline such considerations at some length.

THE ROLE OF CALLABLE BONDS IN PUBLIC FINANCE

Bonds with optional call periods at present constitute, and for many years have constituted, valuable and important instruments of public finance. As of the most recent dates for which information is available, approximately 90 per cent of the long term interest-bearing public debt of the United States, 90 per cent of the long term internal debt of Great Britain, and a very large percentage of

the long term internal debt of France,[1] consisted of securities redeemable at the option of the respective issuing governments prior to their final dates of maturity, or, in the case of perpetual annuities, redeemable either at the present or after some definite date in the future.

The use of callable bonds has characterized American public finance from the beginning.[2] The loan negotiated from Holland in 1784 by the Government acting under the Articles of Confederation was callable at our option prior to its final maturity; and the loans negotiated from Holland and Antwerp in 1791 by the new Government organized under the Constitution were similarly callable. From this beginning to the present time, whenever the public debt has been of any magnitude, callable bonds have been an important component of the total, and the few occasions when their use has been neglected have, for the most part, been subsequently regretted.

The United States Government in making its earliest bond issues callable prior to their final maturity and in continuing the use of this type of instrument throughout our whole national history,

[1] These figures exclude United States Treasury Notes, Certificates of Indebtedness and Bills; British Treasury Bills and Ways and Means Advances; and French floating, short-term and medium-term debt. Data does not permit the ascertainment of the exact percentage of callable debt in the case of France.

[2] A complete list of Government obligations which have contained redemption provisions is set out in Appendix A, pp. 104–108.

has followed the precedent set by the leading financial powers. Such securities, in a rudimentary form, were used by many European countries during the Middle Ages, and by the eighteenth century the greater part of the debt of Great Britain consisted of redeemable bonds in essentially their modern form. It was one of the financial reforms of Napoleon to fund more than sixty smaller loans into a single issue of redeemable Rentes. Great Britain profited from the prior inclusion of optional call provisions in her bonds, as early as 1717, when the rate of interest on the public debt was reduced from 6 per cent to 5 per cent by a conversion operation. Subsequent important conversions, made during the eighteenth and nineteenth centuries whenever periods of low interest rates permitted, resulted in converting the bulk of the British debt by 1888 into bonds bearing 2¾ per cent interest, until 1903, and 2½ per cent interest thereafter. The French Government also effected material savings during the nineteenth century by the calling of bonds prior to maturity, the interest on a large portion of the debt being reduced from 5 per cent to 3½ per cent between 1883 and 1894 by this method. In 1932 Great Britain undertook and successfully completed the most important single operation of this kind ever undertaken when she converted approximately £2 billions of the 5 per cent War Loan into 3½ per cent Conversion Loan. This operation—made possible only by the

prior inclusion of a callable provision in the bonds—not only effected an annual saving of about £30 millions in interest on the public debt, but opened the way for a corresponding reduction in the rates at which private debtors were able to borrow. In the opinion of many economists, it was a vital factor in promoting and bringing about the British recovery from the depression.

The long continued use of callable bonds by so many governments indicates their value as instruments of public policy.[3] The reasons for this widespread use of callable bonds revolve around the variability and difficulty of prediction of interest rates, on the one hand, and the corresponding variability and difficulty of prediction of government receipts and expenditures, on the other.

The interest rate commanded by long-term obligations fluctuates widely. The chart printed as Appendix B, pp. 109–110, *infra,* shows the average annual yields on British Consols from 1790 to 1936, inclusive, on French Rentes from 1825 to 1936, inclusive, on high-grade American railroad bonds from 1857 to 1919, inclusive, and on long-term

[3]Adam Smith had advocated their use before the foundation of the American Republic, while Professor Henry C. Adams, the dean of our own writers on public finance, criticized the Refunding Act of 1870 because it did not take sufficient advantage of the use of optional call periods, and strongly urged that they be availed of to the utmost extent. *Wealth of Nations*, Book V, c. III. *Public Debts*, pp. 226 ff.

Liberty Loan and Treasury bonds from 1919 to 1936, inclusive.[4] A study of the chart brings out two important factors. First, interest rates fluctuate over a very wide arc. The highest annual average yield on British Consols during the period covered was considerably more than twice the lowest annual average yield (5.9 per cent in 1797 as compared with 2.5 per cent in 1897). Second, high rates have generally prevailed during and immediately following periods of war. Since most governmental debts have also been incurred during time of war, it follows that the greater part of such debts has been incurred during times of very high interest rates.

It is naturally very much to the interest of all governments that debts incurred at high rates of interest during such times be refunded at lower rates, and their burden correspondingly reduced as soon after the passage of the emergency as possible. Secretary Chase recognized this fully at the

[4] The yields on high-grade railroad bonds have been taken as representative of American interest rates during the period prior to 1919, since during most of this period the larger portion of the United States public debt was held by national banks as security for their circulation, and the quotations on United States Government bonds consequently were not representative of conditions in the money market generally or of the rates at which the Government could have borrowed any amount of money greatly in excess of the amount of bonds required by the national banks for this purpose.

beginning of our Civil War, and in his Annual Report for 1861–1862 said:

> No prudent legislator * * * will consent to impose on the labor and business of the people a fixed interest of six per cent on a great debt, for twenty years, unless the necessity is far more urgent than is now believed to exist. *The country has already witnessed the results of such* measures in the payment, in 1856, *of more* than four and a *half millions of dollars* for the privilege of paying a debt of less than forty-one millions, some twelve years, averaged time, before it became due.[5]

The wisdom of Secretary Chase's policy in this respect and the potential costliness of the opposite policy is indicated by his reference to the four and *a half millions of dollars* premium paid in 1856 for the redemption prior to maturity of bonds which had carried no callable clause upon original

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[5] In his Annual Report for 1862–3, Secretary Chase added: "The object of future controllability has had a prominent place in the regards of the Secretary * * * As soon as permitted by circumstances, (he) recommended the enactment of laws authorizing the issue of bonds payable after short periods * * * In harmony with these views Congress provided for the issue of the bonds known as the five-twenties.

"The Secretary availed himself of this legislation by placing with the people as large an amount as possible of five-twenty bonds, and by using the other powers so as to put the whole debt * * * in such a shape that prompt advantage can be taken of favorable circumstances to diminish the burdens it imposes on industry."

issuance.[6] The error which Secretary Chase avoided was in fact made, although on a smaller scale and in degree rather than in kind, by the Refunding Act of 1870, which provided for the refunding of a large amount of the war debt into 4 per cent bonds not callable for 30 years. During the fiscal years 1889 to 1891 the Treasury paid premiums aggregating $48 millions for the retirement prior to its first optional redemption date of $270 millions principal amount of debt, an expense which could have been avoided by a more judicious use of optional call periods in the post-war refunding operations.[7]

During the World War, interest rates were again very high and the Treasury again sought to reduce the ultimate cost of the War by the insertion of optional call periods in the war loan bonds. As of August 31, 1919, when the war debt stood at its peak, approximately 75 per cent of the total debt then outstanding, issued subsequent to March 31, 1917, and having a maturity of more than one year, provided for an optional call period prior to its final maturity. As a consequence of these call provisions, the Government has been enabled to save very substantial amounts of interest by redeeming this debt prior to maturity and replacing it with issues bearing a lower rate of interest.

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[6] See D. R. Dewey, Financial History of the United States (12th ed., 1934), pp. 255–256.

[7] Dewey, *op cit.*, pp. 429–431.

The operations just cited involved for the most part the refunding of war debts in times of peace. Reference to the chart, *infra,* pp. 109–110, indicates clearly, however, that interest rates fluctuate very materially even during times of peace, and the range of fluctuation and the great difficulty of predicting changes in the interest rate, even in such times, clearly shows *the unwisdom,* from the standpoint of changes in interest rates alone, of incurring at any time a commitment to pay a fixed rate of interest indefinitely into the future without reserving the right of redemption in the event of a substantial fall in the rate of interest. As a matter of fact, both the United States and foreign countries have made substantial savings by refunding in times of peace, debts also incurred in times of peace.

The reasons so far cited for the inclusion of call periods in the governmental debt have been concerned with fluctuations in the rate of interest. Of perhaps equal importance, are fluctuations in and the uncertainty of prediction of governmental receipts and expenditures, and hence of surpluses and deficits. If it were possible to forecast accurately these surpluses and deficits, it would also be possible to arrange a maturity schedule of the public debt, so that the maturities in each year could be taken care of with the surplus revenues of the same year. It is in practice impossible, however, to arrange such a schedule, since estimates of revenues and expenditures for half a

generation, or even half a decade hence, are subject to extremely wide margins of error. If these errors are resolved on the "safe side" and maturities are kept very small, the Treasury may be embarrassed by a surplus of funds and find it necessary to purchase public debt in the open market at large premiums, as was actually the case during the two periods of American history previously cited.[8] If, on the other hand, the doubts are resolved the other way, and the annual maturities are made large, the Treasury may be even more badly embarrassed by a shortage of funds and find it necessary to borrow at high rates of interest to refund maturing bonds bearing low rates. Any maturity schedule of noncallable bonds is almost certain to run afoul of one or the other of these difficulties; and, even if it should by great good luck avoid them, would probably still cost dearly in lost opportunities for the reduction of interest charges.[9]

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[8] For two other such periods (1806–11 and 1829), see Adams, *op. cit.*, pp. 225–6.

[9] Optional call periods have, of course, a wide use, and for similar reasons, in private finance. On December 31, 1934, the funded debt of industrial, public utility, and street railway corporations registered (or temporarily exempt) under the Securities Exchange Act of 1934 totaled approximately $8,361,000,000. Of this amount, about one-half, or approximately $4,152,000,000, consisted of obligations dated prior to June 5, 1933, which were still outstanding and not due on April 30, 1937. Of this latter amount, approximately $3,774,000,000 (89.9 percent) contain provisions authorizing redemption prior to maturity. On or about December 31, 1936, there were outstanding at least $5,851,000,000 of steam

The use of optional call periods has permitted the Treasury to provide for these contingencies. If these call provisions should be rendered nugatory, the balance already achieved in these respects would be destroyed.

The fact that a decision favorable to these bondholders would constitute a serious interference with the power to manage the public debt, a power essential to the proper exercise of the borrowing power, is particularly apparent when consideration is given to the large amounts of Government "gold clause" obligations which have been called for redemption since 1933, and to the almost equally large amounts of such obligations which are still outstanding and uncalled. Since 1933 "gold clause" obligations of the United States in the aggregate amount of $8,850,072,430 have been called for redemption prior to maturity. The computed interest on such obligations from the dates fixed for their redemption to the dates of maturity specified therein totals $1,871,603,255.27. Obligations of this kind in the aggregate amount of $70,500,420 were still outstanding on June 30, 1937.

The aggregate amount of First and Fourth Lib-

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railroad bonds containing callable provisions, which were dated prior to June 5, 1933. A general examination of the issues appears to indicate that most corporate bonds dated prior to June 5, 1933, contained "gold clauses."

erty Loan bonds (to which classes of obligations the bonds here involved belong) called for redemption since 1933 is approximately $8,175,446,800. Of this amount $6,948,333,550 has been refunded by the exchange of such bonds for other obligations of the United States. The interest saving (from the call dates to the maturity dates of the First and Fourth Liberty Loan bonds) effected by this refunding operation is approximately $552,707,592.75. The possible interest saving which might have been effected by a refunding of all of the First and Fourth Liberty Loan bonds called for redemption into obligations maturing on the respective final maturity dates of such Liberty Loan bonds is estimated at approximately six hundred eighty-nine millions.

It is obvious that a decision favorable to the bondholders in the present cases challenging the validity of this refunding and retirement of a large part of the public debt would seriously affect Government financial operations even if such decision were limited to a holding that those persons who have not yet surrendered their bonds are entitled to retain them and receive interest thereon. Such a decision, it should be noted, would mean that the Government could not validly redeem the Consols of 1930 unless it were prepared to pay them in gold coin, because such bonds had no definite maturity dates. Consols of 1930 in the amount of

$599,724,050 were called for redemption on July 1, 1935. On June 30, 1937, Consols of this kind in the amount of $3,009,450 were still outstanding, and as a result of such a decision would become perpetual annuities.

The effect of such a decision as an interference with the power to manage the public debt is even more apparent when it is viewed in relation to the large number of "gold clause" public debt obligations which contain a redemption privilege, but which have not yet become callable. On June 30, 1937, obligations of this kind in the aggregate amount of $5,255,877,980 [10] were outstanding. The computed interest from the call dates of such obligations to the dates of maturity is in excess of a billion dollars.[11] The possible consequences of a decision of this Court which would prevent the retirement or refunding of such obligations until the Government paid them in gold

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[10] *United States gold clause public debt obligations outstanding June 30, 1937*

[As shown by Treasury Daily Statement]

Pre-War Loans: 2½% Postal Savings Bonds (13th to 44th Series) maturing serially, July 1, January 1, 1937–1953, redeemable on and since January 1, 1934		$45,043,980
Treasury Bonds:		
4¼'s of 1947–52	$758,955,800	
4's of 1944–56	1,036,702,900	
3¾'s of 1946–58	489,080,100	
3⅜'s of 1943–47	454,135,200	
3⅜'s of 1940–43	352,993,450	
3⅜'s of 1941–43	544,870,050	
3⅛'s of 1946–49	818,627,000	
3's of 1951–55	755,469,500	
		5,210,834,000
		5,255,877,980

coin or, in any event, until the maturity of the obligations are evident. It is equally apparent that payment of such obligations in gold coin might seriously interfere with Government monetary policies.

Having reviewed the considerations of financial policy which render the exercise of the power to call obligations for redemption of such tremendous importance to the Government, we turn to inquire whether any considerations of the law of contracts or of statutory interpretation, or any constitutional principle, require a conclusion that the power in these cases *did not* exist.

I

THE OBLIGATION OF THE UNITED STATES TO PAY INTEREST HAS TERMINATED, SINCE THE CONDITION UPON WHICH INTEREST WAS TO CEASE HAS OCCURRED

The bondholders rest their case upon a contractual obligation. The relevant provisions of the

[11] *Interest rate on long-term Treasury bonds issued since April 15, 1934*

	Date of Issue	Redeemable (on or after)	Payable	Amount
3¼'s 1944-46	Apr. 15, 1934	Apr. 15, 1944	Apr. 15, 1946	$1,518,858,800
3's 1946-48	June 15, 1934	June 15, 1946	June 15, 1948	1,035,865,050
3¼'s 1949-52	Dec. 15, 1934	Dec. 15, 1949	Dec. 15, 1952	491,377,100
2½'s 1955-60	Mar. 15, 1935	Mar. 15, 1955	Mar. 15, 1960	2,611,156,200
2¾'s 1945-47	Sept. 16, 1935	Sept. 15, 1945	Sept. 15, 1947	1,214,453,900
2¾'s 1948-51	Mar. 16, 1936	Mar. 15, 1948	Mar. 15, 1951	1,223,496,850
2¾'s 1951-54	June 15, 1936	June 15, 1951	June 15, 1954	1,626,688,150
2¾'s 1956-59	Sept. 15, 1936	Sept. 15, 1956	Sept. 15, 1959	981,848,050
2½'s 1949-53	Dec. 15, 1936	Dec. 15, 1949	Dec. 15, 1953	1,786,504,050

bonds held by the claimants in No. 42 (R. 5–6) and No. 198[12] (R. 18–19) are as follows:

> * * * The principal and interest of this bond shall be payable in United States gold coin of the present standard of value * * *. * * * All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment

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[12] The provisions of the bond held by the petitioner in No. 43 have only immaterial variations (R. 5–6):

"* * * The principal and interest hereof are payable in United States gold coin of the present standard of value. * * * All or any of the bonds of said series may be redeemed at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest, as in said circular provided. * * *"

The Treasury Circular provides (R. 6, 7):

"* * * The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. * * * *From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease.* The principal and interest of the bonds are payable in United States gold coin of the present standard of value. [Italics supplied.]

The coupon upon which suit is brought reads as follows (R. 7):

"The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bond of 1933–1938 *unless called for previous redemption.*" [Italics supplied.]

> date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months' period as the Secretary of the Treasury shall direct. * * * *From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void.* * * * [Italics supplied.]

These provisions constitute the entire contract between the parties with respect to the matter immediately in controversy. By this agreement the obligation to pay interest on the bonds was specifically to cease upon the issuance of a notice of call and the passage of time to the date designated in such notice.

The provisions in question thus differ from occasional provisions for redemption, conditioned upon actual payment of the obligation. Thus, in *Sterling* v. *H. F. Watson Company,* 241 Pa. 105, the stock certificate provided:

> The stock * * * is subject to the right of the H. F. Watson Company, at its option to retire and extinguish the same *upon the payment* to the owner thereof of all arrears of dividends and the par value * * * [Italics supplied].

The terms of the contract between the United States and these bondholders did not require that

there be a redemption by actual payment in order that the interest on the obligation as such should terminate. They required only the giving of a notice of call for redemption and the arrival of the date specified in that notice. Upon the occurrence of these conditions, two legal consequences followed: the bondholders became entitled to demand payment of the principal amounts of their bonds, and the obligation of the United States to pay interest ceased. By the terms of the contract these two consequences were inseparable.[13] The promise of the bond to pay interest is a promise to pay only "until the principal hereof shall be payable." If words have any meaning, "payable" does not connote "paid."

On March 14, 1935, the Secretary of the Treasury issued the following notice (R. No. 42, 9; R. No. 198, 20–21):[14]

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[13] See *Morgan* v. *United States*, 113 U. S. 476, in which the Court said (at pages 498, 502):

"The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date * * *.

"* * * the obligation to pay interest ceases because that is the contract, to which the holder of the bond has consented and to which he submits * * *."

[14] The call of the bond involved in No. 43 was as follows (R. 8):

"1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼ per

> Public notice is hereby given:
>
> 1. All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. * * *.
>
> 2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935.
>
> 3. *Full information regarding the presentation and surrender of First Liberty Loan bonds for redemption under this call* will be given in a Treasury Department circular to be issued later.

The Treasury Circular, issued on April 22, 1935, stated (R. No. 42, 10–14; R. No. 198, 21–26):

> 1. *Payment of called bonds on June 15, 1935.*—Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds.

It is apparent that the call for redemption was issued in virtually the language of the bonds themselves.[15] These cases are, therefore, unlike the

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cent bonds of 1933–38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

* * * * *

"2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934."

[15] Nothing, of course, turns upon the use in the redemption circular of the phrase "at par" rather than the phrase "at

case of *Sterling* v. *H. F. Watson Co., supra,* and other cases cited by the bondholders, in which the call was in terms to pay something less than was due. The calls here in question bound the Government to perform whatever its obligation required it to perform. If, after the call, it had been *determined that* the Government was bound to pay something in excess of the face amount of the bond in legal tender currency or to pay in gold the Government would have been obligated to make such payment.

A. THE CALLS FOR REDEMPTION HERE ISSUED WERE EFFECTIVE TO CREATE THE RIGHT TO PAYMENT ASSURED BY THE BONDS, AND SO TO TERMINATE THE OBLIGATION TO PAY INTEREST

The basic fallacy underlying the theory of the present proceedings is the assumption that an obligor in calling bonds for redemption is bound to take a position upon any controversy concerning its principal liability. In effect, it is insisted that the function of a notice of call for redemption is to define and tender the principal performance due, that its validity depends upon the accuracy of the definition, and that any bondholder who

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face value" as used in the bonds. The two expressions are interchangeable in meaning and, as these records show, the practice of the Treasury Department has been to use them interchangeably. The bond held by the petitioner in No. 43 used the phrase "at par." See note 12, *supra.* So also did the Treasury Circular under which the other bonds were issued (R. No. 42, 8).

disputes the definition is free to attack the call rather than to sue for the principal performance which he conceives to be due. These assumptions appear to be responsible for the effort here made to construe these calls, which admittedly were silent as to the medium of payment (Brief, No. 42, 14), as committing the United States to one mode of performance and one mode only. The contention overlooks the possibility, and the validity, of a call which operates simply to subject the obligor to liability to pay whatever he may be legally obliged to pay.

The Circuit Court of Appeals, in No. 198, stated (R. 29, 30) that the argument of the Government and the decision of the Court of Claims in No. 43 proceed upon the theory that a notice of redemption is sufficient "which states that the bonds will be redeemed on the named date, even though it does not say or mean to say that they will be redeemed in accordance with their terms." This is an incorrect statement of the decision of the Court of Claims and of the position which the Government has taken throughout these cases. Both the Court of Claims and the Government proceed upon the theory that the notice of redemption, which was in the usual form, operated to create, and was intended to create, the same right to payment assured by the bonds themselves; and that it was therefore effective to terminate the obligation to pay interest.

The Circuit Court of Appeals recognized (R. 28) that the notice of call for redemption was in the

usual form and that it would be effective to stop the running of interest (and by the same token to accelerate the principal debt), "except for the legislation of Congress affecting the currency, which limited the power of the Secretary of the Treasury and must be read into the notice." The court stated that the Secretary of the Treasury was allowed to pay Government "obligations in currency only 'dollar for dollar,' notwithstanding such obligations may contain a gold clause," and added (R. 30):

> * * * whatever the validity of the legislation and the proclamation in question, so far as impairing the obligations of the government is concerned, they are unquestionably valid as limitations upon the power of the Secretary of the Treasury.

It is true that the Secretary of the Treasury would not have been authorized, in the absence of an authoritative determination of the rights of the holders, to pay the bonds otherwise than dollar for dollar in legal tender currency. This circumstance, however, in no wise affects the legal obligation previously incurred by the United States. Nor does it affect the power of the Secretary to issue a call which would accelerate that obligation to its full extent under the law. No basis is suggested for questioning the power of the United States to discharge that liability, whatever it should be determined to be. Although the consent

of the United States to be sued is "a matter of procedure which does not affect the legal and binding character" of its obligations (*Perry* v. *United States, supra,* at p. 354; *Lynch* v. *United States,* 292 U. S. 571, 580, 582), the United States in fact was subject to suit upon the bonds to determine any controversy concerning the extent of its liability. Nothing in the monetary legislation in force at the time the calls were issued had the effect of withdrawing the consent of the United States to be sued. Nor is there anything therein to warrant a conclusion that any judgment which might have been rendered against the United States would not have been paid.

That the calls here in question operated to subject the United States to an accelerated liability to the full extent of its obligation, and that the United States was subject to suit upon that obligation, is conclusively established by the decision of this Court in *Perry* v. *United States, supra.* The *Perry* case was a suit for the principal amount of a bond included in the same call as the bond held by the petitioner in No. 43. If, as now suggested, the call was ineffective to create a judicially enforceable obligation against the United States, it is manifest that such a suit could not have been maintained. An attempt is made to distinguish the *Perry* case on the ground that "the question of the validity of the call was not raised in that case and was not considered by the court" (R. 29). But the question of

the existence of any present obligation and of its enforceability lay at the foundation of the plaintiff's cause of action and of the Court's jurisdiction. That it was not "considered" by the Court—that the Court did not dismiss the certificate—signified only that the Court did not consider it debatable.

Nor is the bondholder's present case helped by the implied suggestion that if the question of jurisdiction had been "considered" in the *Perry* case, it would have been necessary to dismiss the proceedings without determination of the merits. Such action would have meant that a claim of breach of obligation of a called bond is self-defeating, since proof of an attempted breach is proof also that the call was ineffectual. The evident injustice and impropriety of such a result, under the then existing legislation of Congress, discloses the error of the argument which would require it.[16]

The provisions for redemption before the Court are to be construed in the same way, and given the same operation, as similar provisions in private

[16] Suits for the principal amounts of United States bonds containing gold clauses are now pending in the district courts and in the Court of Claims, including the original suit of the plaintiff in the *Perry* case, now pending upon an amended petition. These suits were filed prior to the effective date of the Joint Resolution of August 27, 1935, 49 Stat. 939, by which Congress sought to remove uncertainties concerning the fiscal obligations of the United States by imposing, in effect, a limitations period upon further actions based upon gold clauses.

obligations. These provisions are advisedly conditioned upon issuance of a notice of call for redemption, plus the designated passage of time, and *not upon* tender of a particular performance. A call for redemption which operates to subject the obligor to whatever liability the instrument creates is not only proper under *such provisions*, but a construction of the call which gives it that effect ought affirmatively to be favored. For a call which is ineffective to terminate the obligation to pay interest must be ineffective also to accelerate the principal debt. If, therefore, a call is construed as tendering only a particular performance, a different performance cannot be demanded in a direct proceeding to recover the principal debt, since proof of the right to such performance would be proof also that the call was invalid and the debt not yet due. Clarification of the status of called bonds could accordingly be obtained only in proceedings to recover interest payments;[17] and the only result of the obligor's attempted breach, if challenged, would be forfeiture of the option of redemption. The liquidity of the capital market would be materially hampered by such restrictions.

[17] So limited a remedy would constitute a hardship to bondholders. The only incentive to suit for interest payments would be the advantage of retaining a favorable investment, if favorable the investment were. The cost of an unsuccessful suit would be the loss of the use of the principal during the period prior to the date of the next coupon and during the period of the subsequent litigation.

The bondholders seek to escape these consequences of the theory of the present proceedings by suggesting that the obligee may have an option either to sue for interest or to treat the call as effective and sue for the principal payment (Brief, No. 42, 16). The existence of such an option on the part of owners of widely held securities would introduce confusion in public and private finance. Examination of the terms of the bonds will show that the suggestion is without foundation in the agreement of the parties. The suggestion runs counter, moreover, to the holding in *Corbett, Executrix* v. *McClintic Marshall Corp.*, 17 Del. Ch. 165, cited by the petitioners in Nos. 42 and 43, in which it was decided that a call to redeem in one fashion, whether valid or invalid, cannot subject the obligor to liability to redeem in a different fashion.[18] The propriety of such a ruling is evident. The suggestion, in any event, is unavailing in the cases at bar, since the construction of existing legislation relied upon to render the call invalid is a construction which would deprive the courts of jurisdiction to entertain suits for a greater payment than that tendered or, indeed (since it would make the proceedings non-justiciable), for any payment.

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[18] It is argued that the obligor "would be estopped to assert the invalidity of its own call" (Brief, No. 42, 16). Very possibly he would be estopped to refuse the payment which his own call was construed as tendering. No ground is apparent, however, upon which he would be estopped from refusing any *greater or different payment*.

B. CESSATION OF THE OBLIGATION TO PAY INTEREST WAS SUBJECT TO NO OTHER CONDITION THAN THE ISSUANCE OF A VALID CALL FOR REDEMPTION

The bondholders make the further contention that the running of interest did not stop on the date designated for redemption, whatever the validity of the call, because of the alleged failure of performance by the Government at that time. In a contract in which cessation of the obligation to pay interest is expressly conditioned upon the issuance of a call for redemption, and not upon actual performance of the principal obligation, they thus seek to interpolate the additional condition that such performance in fact be made.

Whatever persuasiveness this contention may have derives from its application to a situation different from that before the Court. The supposition is made of a refusal to honor an admitted liability, as in a case in which funds are not on hand to pay a sum concededly due. But even if interest under the contract would continue to run in such a case, it does not follow that, where the extent of the obligation is in dispute and the obligor is subject to suit thereon, the obligee may elect to continue to draw interest merely because the obligor has not yielded to his view of the obligation.

The bondholders' contention is unsubstantiated by any judicial authority, even as applied to a situation of admitted default. The present question, of course, has no relation to the problem of implied

conditions in bilateral contracts which arises when one party, having failed to perform fully, sues to compel performance by the other party, or to recover damages for non-performance. A callable bond is a unilateral contract. The bondholder is subject to no duty of performance. The issue here is not whether a party who is in default can insist on performance by the other party, but whether the party advancing the claim of default, who owes no duty of performance, can, in lieu of bringing suit to settle the claim, insist as an implied condition of the contract upon a performance which has not been promised. The cases cited by the bondholders afford no support for the theory that such an action is maintainable. The cases of *Sterling* v. *H. F. Watson Company,* 241 Pa. 105, and *Corbett, Executrix* v. *McClintic Marshall Corp.,* 17 Del. Ch. 165, both involved calls for redemption which were invalid by the terms of the contract. In the English case of *Gordillo* v. *Weguelin,* 5 Ch. Div. 287, emphasis similarly was placed (p. 296) upon provisions of the contract indicating that deposit of sums for payment was a condition precedent to redemption. The question there at issue was twofold: whether holders of bonds drawn for redemption, but unpaid, were entitled to receive interest after the debtor's failure; and if so, whether they were entitled to share ratably with holders of undrawn bonds. The court was agreed that the holders of drawn bonds were entitled to receive interest

by way of damages. One judge, however, concluded that such claims were inferior to claims for contractual interest. The other two members of the court held that they were on a parity with claims for such interest (pp. 297, 303). They did not hold that the claims in question had the technical status of contractual interest.

Damages or interest at a statutory rate (compare *Spaulding* v. *Lord,* 19 Wis. 533) are the appropriate remedies for non-payment of a debt when due, not disregard of contractual provisions for redemption. The bondholders give no adequate reason for departure from such a rule here. Certainly the fact that interest is not allowed, in the absence of specific statutory authorization, on claims against the Government (*Angarica* v. *Bayard,* 127 U. S. 251, 260; *United States* v. *North Carolina,* 136 U. S. 211; *Seaboard Airline Ry.* v. *United States,* 261 U. S. 299, 304; *United States* v. *North American Co.,* 253 U. S. 330, 336) is not such a reason. The case must be judged according to a rule of law applicable to public and private obligations alike. To do otherwise in this case would be to defeat by indirection the rule concerning interest on Government obligations, and to do so in order to meet a purely hypothetical situation. We submit that the suggestion (Brief, No. 43, p. 19) that "the necessary and logical conclusion from the Government's position is that * * * the Government could call a bond without the slightest

intention of paying it and thereby cause interest to stop running" is unworthy of serious consideration.

C. THE SECRETARY OF THE TREASURY WAS AUTHORIZED TO ISSUE THE NOTICE OF CALL WHICH TERMINATED THE OBLIGATION TO PAY INTEREST

The argument of the petitioners in Nos. 42 and 43 (Brief, No. 43, pp. 23, 24) that the Secretary of the Treasury had no authority to call the bonds for redemption is entirely without merit.

1. The right to call the bonds for redemption before maturity depends, in the first instance, upon the Acts of Congress pursuant to which the bonds were issued. Act of April 24, 1917, 40 Stat. 35 (No. 42); Act of September 24, 1917, 40 Stat. 288, as amended (No. 43). In these statutes Congress departed from its usual prior practice of prescribing most of the terms of the obligations to be issued, and conferred upon the Secretary of the Treasury a broad discretion. The Act of April 24, 1917 provided:

> *The bonds* herein authorized *shall be* in such form and *subject to such terms and conditions of* issue, conversion, *redemption,* maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum per annum, *as the Secretary of the Treasury may prescribe.* [Italics supplied.]

To similar effect is the following provision contained in the Act of September 24, 1917, both in its original and amended form:

> *The bonds* herein authorized *shall be* in such form or forms and denomination or denominations and *subject to such terms and conditions of* issue, conversion, *redemption,* maturities, payment, and rate or rates of interest, not exceeding * * * per centum per annum, * * * *as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe.* [Italics supplied.]

The petitioners' contention is built upon the provisions both of the bonds and the issuing circulars which state that the bonds may be redeemed "at the pleasure of the United States." A question is thus raised not of the intention of Congress, as manifested by the statutes, but of the intention of the Secretary of the Treasury in exercising the power conferred upon him. The position is that the intention of the Secretary was to prescribe a procedure contrary to that actually followed. The broad discretionary power conferred by Congress upon him, it is urged, was exercised (although it need not have been) so as to require a further Act of Congress to authorize redemption prior to maturity.

This contention seeks to read into the phrase which creates the option in the obligor a further statement as to the agency through which the option will be exercised. It ignores the additional provision of the bonds and the issuing circular that the pleasure of the United States shall be manifested on notice given in such manner as the Sec-

retary of the Treasury shall prescribe.[19] The petitioners' contention mistakenly conceives of the pleasure of the Secretary of the Treasury, acting in the course of official duty and with authority in the premises, as something necessarily to be distinguished from the pleasure of the United States. The phrase 'at the pleasure of the principal' is an apt description by an agent of a determination to be made by him, pursuant to previous authorization, on behalf of the principal.

The redemption of bonds is no doubt "a major financial transaction" (Brief, No. 42, p. 24). The original Liberty Loan Acts, however, show that it is not one "requiring the consideration of Congress." A degree of promptitude and flexibility of action is manifestly advantageous. To suppose that, Congress having conferred upon the Secre-

[19] The bond in No. 42 provides:

"All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct."

The provision of the issuing circular, to which the bond in No. 43 refers, was as follows:

"The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe."

tary of the Treasury a broad discretionary power respecting the redemption of bonds, it was the Secretary's intention to require in each case a further Act of Congress, to be followed by a three or six months' notice, is patently absurd.[20]

2. Whatever doubts may exist as to the authority of the Secretary of the Treasury to call bonds for redemption are resolved by other legislation recognizing and confirming that authority:

> VICTORY LIBERTY LOAN ACT, C. 100, SEC. 6, 40 STAT. 1311, AS AMENDED MARCH 2, 1923, C. 179, 42 STAT. 1427, AND JANUARY 30, 1934, C. 6, SEC. 14 (B), 48 STAT. 344
>
> That there is hereby created in the Treasury a cumulative sinking fund for the retirement of bonds and notes issued under the First Liberty Bond Act, the Second Liberty Bond Act, the Third Liberty Bond Act, the Fourth Liberty Bond Act, or under this Act, and outstanding on July 1, 1920, and of bonds and notes thereafter issued under

[20] The distinction between the situation here presented and that in *Morgan* v. *United States*, 113 U. S. 476, is obvious. Congress specifically prescribed many of the terms (including a limitation as to the date of redeemability and the date of final maturity) of the bonds involved in the *Morgan* case, and the discretion of the Secretary of the Treasury was very limited. The power conferred upon the Secretary by the Act pursuant to which the bonds were issued clearly did not include an authorization to call the bonds for redemption prior to maturity (Act of March 3, 1865, 13 Stat. 468), and accordingly a further Act of Congress was necessary for that purpose (Act of July 14, 1870, 16 Stat. 272).

> any of such Acts or under any of such Acts as amended. The sinking fund and all additions thereto are hereby appropriated for the payment of such bonds and notes at maturity, or for the *redemption* or purchase thereof before maturity *by the Secretary of the Treasury* at such prices and upon such terms and conditions as he shall prescribe, and shall be available until all such bonds and notes are retired.

See also: Gold Reserve Act of 1934, c. 6, sec. 14, 48 Stat. 343; Act of February 4, 1935, c. 5, secs. 2, 4, 49 Stat. 20. Compare *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

D. THE ACT OF MARCH 18, 1869, DOES NOT AFFECT THE VALIDITY OF THE CALLS FOR REDEMPTION HEREIN ISSUED

The petitioners in Nos. 42 and 43 urge, finally, that the Act of March 18, 1869, R. S. 3693, 16 Stat. 1, forbade the issuance of the notices of call for redemption here involved (Brief, No. 42, pp. 24–26). That Act in part provided:

> That in order to remove any doubt as to the purpose of the Government to discharge all just obligations to the public creditors and to settle conflicting questions and interpretations of the laws by virtue of which such obligations have been contracted, it is hereby provided and declared that the faith of the United States is solemnly pledged to the payment in coin or its equivalent, of all obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the

> United States except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver. *But none of said interest-bearing obligations not already due shall be redeemed or paid before maturity unless at such time United States notes shall be convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin* * * *.

1. The petitioners rely upon the second sentence of the Act, which has been italicized. The purpose of that sentence, as its language makes plain, was the protection of holders of United States notes (greenbacks) and not at all of holders of outstanding interest-bearing obligations. The history of the Act shows that the provision became obsolete, its purpose being achieved, when United States notes in 1879 were established on a parity with all other forms of money.

In the first sentence of the Act a pledge had been made for the ultimate payment in coin or its equivalent of (1) United States notes, and (2) Government interest-bearing obligations (except obligations issued under a law expressly providing for payment in some currency other than gold or silver coin). The United States notes were circulating in 1869 at a great discount in comparison with gold and silver coin, which were also in circulation. In addition, during and prior to the Civil

War, the Government had issued bonds which did not expressly state the medium of payment and as to which there was, therefore, doubt. The Act of 1869 sought to alleviate these conditions by a declaration of policy, anticipating the eventual reestablishment of a single standard of value. It sought to do this evenhandedly as between holders of United States notes and Government bonds. In order to protect noteholders, who were not to be paid gold coin or its equivalent immediately, the sentence in question accordingly provided in its first half that until such noteholders were so paid, the payment of bondholders should not be hastened by redemption.

> That is, the bonds of the United States are not to be paid before maturity, while the noteholders are to be kept without their redemption, unless the noteholders are able at the same time to convert their notes into coin. (Congressman Robert C. Schenk, one of the House managers, Congressional Globe, March 3, 1869, p. 1879).

Then, in order not to make that restriction too onerous and to enable the United States to refund its outstanding obligations at a lower rate of interest, should the credit of the Government warrant it, even though there had been no resumption of specie payments on the United States notes, the second half of the second sentence was included.

> * * * It was provided that the Government should not redeem any of its

> obligations in coin before their maturity, * * * until the public credit should have become so good that the Government could sell bonds bearing lower rates of interest at par in coin. (*Information Respecting United States Bonds, Paper Currency and Coin, Production of Precious Metals, etc.*, issued by the Treasury Department, Division of Loans and Currency, July 1, 1915, p. 8).

In view of the purposes, and the circumstances of enactment, of the Act of 1869, it seems apparent (1) that it was intended to apply only to Government bonds then outstanding—or, in the words of the Act, "not already due";—and (2) that the Act became obsolete and ceased to have significance the moment the Government, in 1879, resumed specie payments on its United States notes and maintained all coins and currencies at a parity of value.[21]

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[21] An examination of the Congressional debates and committee reports on this Act and other bills containing comparable provisions confirms these conclusions. Congressional Globe, November 21, 1867, p. 767; December 4, 1867, pp. 24, 25, 26; December 5, 1867, pp. 40–49; December 6, 1867, p. 64; December 16, 1868, pp. 98–99; December 18, 1868, pp. 144–145; January 20, 1869, p. 476; February 22, 1869, pp. 1445–1448; February 23, 1869, pp. 1470, 1471; February 24, 1869, pp. 1534–1539; February 27, 1869, pp. 1658–1661; March 3, 1869, pp. 1829–1834; pp. 1879–1883; March 9, 1869, p. 31; March 11, 1869, pp. 48–56; March 12, 1869, pp. 60–61; March 15, 1869, pp. 64–70; Dewey, *Financial History of the United States* (12th Edition), Sec. 148; Hepburn, *History of Currency in the United States*, pp. 209, 214.

2. These conclusions are further borne out if it be assumed that the Act of March 8, 1869, applied to the redemption of the bonds here involved and an attempt be made to test the validity of the redemption by its terms.

The provision being manifestly for the protection of United States noteholders, a question at once arises whether a bondholder has standing to invoke it. The second sentence, in any event, appears as a qualification of the first; and the question exists whether it has any application where the pledge of the first sentence has already been satisfied. The pledge is for the payment of coin or its equivalent. If United States notes are the equivalent of whatever coin is in circulation, it would appear to be irrelevant to inquire whether their holders can compel them to be converted into coin. The phrase, "unless at such time United States notes shall be convertible into coin at the option of the holder," is a way of saying, "unless United States notes are the equivalent of coin." Under this view, if all coin were withdrawn from circulation the redemption of bonds would not thereby be foreclosed.

In any case the short answer is that both the alternative provisos are satisfied since, when these bonds were called, United States notes were convertible into coin, and United States bonds bearing a lower rate of interest could have been sold for coin. The petitioners' assumption that the word "coin" means "gold coin" is gratuitous. At the

time the Liberty Loan bonds were called for redemption and at the date set for redemption, any holder of a United States note could have presented it to the Treasury of the United States or any fiscal agency thereof and obtained in exchange therefor silver coin. (Compare R. No. 42, 17.) This practice was not only the necessary result of the parity statutes (e. g., Act of March 14, 1900, c. 41, 31 Stat. 45; Act of May 12, 1933, c. 25, sec. 43 (b) (2), 48 Stat. 31, 53), but it was also confirmed in Treasury Department Circular No. 553, dated September 10, 1935.[22]

There is no question but that the Government during the time these bonds were called for redemption could have sold at par in coin bonds bearing a lower rate of interest than the petitioners' bonds. Obligations at such lower rates of interest were in fact issued (see Annual Reports of the Secretary of the Treasury for the fiscal years 1933–1935) at par at a time when all coins and currencies, including silver dollars, were at a parity of value. Accordingly persons would have been just as willing to pay silver coin for such obligations as any other coin or currency. There is no

[22] *Regulations Governing the Exchange of Coins and Currencies of the United States:* "* * * the official agencies of the Treasury Department *will continue* to exchange the coins and currencies of the United States, dollar for dollar, for other coins or currencies which may be lawfully acquired and are legal tender for public and private debts, *to the extent and in the manner in effect immediately prior to the date hereof.*" [Italics supplied.]

basis for contending, as do the petitioners, that the Act of 1869 required that the Government be able to sell its bonds for gold rather than for silver coin; nor that the size of the bond issue is of any consequence since the statute makes no reference to the number of bonds sold, or in fact that there be any actual sale. The fact of the matter is that so long as coins and currencies are maintained at a parity of value, as has been true since 1879, the Government *can* sell bonds at par in silver coin as well as in any other form of coin or currency, and the conditions of the statute, if not obsolete for the reasons previously indicated, have been fully met.

II

Even if Cessation of the Obligation to Pay Interest Were Dependent Upon Fulfillment of the Principal Obligation of the Bonds, That Obligation Has Been Fulfilled

The case for the bondholders rests ultimately upon the contention that the United States is in default upon its contract. Being so in default, it is urged, the United States cannot exercise its option under the contract to terminate the obligation to pay interest. The contention that the United States is in default upon the contract is based upon the decision of this Court in *Perry* v. *United States,* 294 U. S. 330. The decision in that case, far from supporting that view, establishes the precise contrary.

The *Perry* case came before this Court on two questions certified by the Court of Claims under Section 3 of the Act of February 13, 1925. One only of these questions the Court answered,[23] which read as follows:

> 1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of $10,000, issued in 1918, which was *payable on and after* April 15, 1934, and which bond contained a clause that the principal is "payable in United States gold coin of the present standard of value", entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

The Court's answer to this question was "no"; and the reason given for the answer, no less than the answer itself, refutes the suggestion that the United States was found to be in any respect in material default upon its contract. It was said (at p. 358):

> * * * in view of the adjustment of the internal economy to the single measure of

[23] The second question, which the Court said "it is not necessary to answer" (294 U. S. at 358), was as follows:

"Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933–1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

> value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the *payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.* [Italics supplied.]

Accordingly, the Court instructed the court below that the plaintiff was entitled to recover *nothing* in excess of the sum ($10,000 in legal tender currency) which the United States had admittedly tendered him.

The litigation which culminated in the decision in *Perry* v. *United States, supra,* presented to the Court every substantial aspect of the controversy concerning the rights of holders of obligations of the United States containing gold clauses. The inquiry propounded by the Court of Claims opened the way either for an affirmative or negative answer, or for a refusal to answer, as the Court might deem appropriate. The questions at issue—involving public interests of a magnitude seldom, if ever, put to the test of litigation—were elaborately argued. The present claimants offer no adequate reason for the reopening of these questions.

In view of the *Perry* decision, the contention that the United States has committed such a default upon its contract as to disable it from enforcing the redemption provisions must rest either upon complaint at the refusal of the United States

to confer upon the bondholders "an unjustified enrichment," or upon complaint at its refusal to pay them in a coin which had no peculiar value to them. The contention, in either view, deserves short shrift at the hands of this Court.

A. THE UNITED STATES IS NOT IN DEFAULT TO THE BONDHOLDERS FOR FAILURE TO PAY THEM IN GOLD COIN

Throughout these proceedings the bondholders have insisted that, under the decision in *Perry* v. *United States, supra,* they are entitled to be paid in gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." [24]

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[24] The original dema ds for payment of their bonds by the petitioners in Nos. 42 and 43 were couched in these terms (R. No. 42, 2, 3; R. No. 43, 2, 3). The respondent in No. 198 made no demand whatever. Compare the opinion of Lord Atkin in *R.* v. *International Trustee for the Protection of Bondholders* [1937], 2 All Eng. L. R. 164, 166.

The petitions in the Court of Claims in Nos. 42 and 43 and in the District Court in No. 198 asserted only the right to payment in gold coin and complained only of its refusal (R. No. 42, 3, 4; R. No. 43, 3, 4; R. No. 198, 9, 10).

The assignment of errors filed in the Circuit Court of Appeals in No. 198 insisted exclusively upon the right to payment in gold coin, and apparently in gold coin of the former weight and content (R. No. 198, 32–34).

The failure of the petitioners in both No. 42 and No. 43 to include in the petition for certiorari or supporting brief an assignment or specification of errors [see Rule 28 (2) and Rule 27 (2) (e)] makes it impossible to ascertain the precise ground relied upon for reversal in this Court. But here, as in the Court of Claims, the call for redemption is

The refusal of the United States to tender payment in gold coin, as demanded, they rely upon as sufficient in itself to establish a breach of the obligation of the bond. This refusal, indeed, appears to be the sole ground upon which the allegation of default is rested.[25] The contention that it is a sufficient ground seems to have been accepted by

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attacked generally as void "because it was a call for payment in currency" (Pet. No. 42, 17; Pet. No. 43, 15); and the repeated assertion of a right to payment "in gold" permeates the entire argument. The brief upon the merits filed in No. 42 contains no reference to any other claim than of a right to be paid in gold coin. It is, indeed, asserted that the petitioners could insist upon such a claim, even though the United States offered to pay them "far more than an equivalent" of the gold coin in legal tender (Brief, No. 42, 17).

[25] The brief filed in the Court of Claims in No. 43 referred in a single instance only to a right to payment "in gold or its equivalent" (p. 7). This claim is not repeated here. See note 24, *supra*.

The Court of Claims in No. 42 made the following finding (R. 18, 19), which is not here challenged:

"Had the plaintiff on December 28, 1935, when he presented the bond to the Treasurer of the United States for payment, received ten thousand dollars in gold coin it was his purpose and intention to send the gold coin to the Northern Trust Company as a routine deposit in the plaintiff's dollar account with that bank, for which plaintiff would have received a credit of $10,000 in such account. Had plaintiff accepted the tendered proceeds of the redemption of the bond, he would have purchased therewith some other investment. On December 28, 1935, there was no other investment which plaintiff might have made in the United States with the $10,000 in gold coin that he could not equally as well have made with $10,000 in legal tender currency."

the Circuit Court of Appeals for the Fourth Circuit.[26]

In this conception of the *Perry* case as sanctioning such a claim the bondholders and the Circuit Court of Appeals are doubly in error. The gold clause in the plaintiff's bonds is not a promise for payment solely in gold coin, and no claim of breach of the promise is supportable which does not allege and prove also a failure to pay the equivalent in value of the gold coin. Even if the gold clause could properly be construed, however, as promising payment in gold coin itself, rather than its equivalent, the *Perry* decision does not warrant the bondholders' assumption that the failure to make such payment, under the circumstances there and here presented, would have constituted a breach of obligation.

1. *The gold clause in the claimants' bonds is not a promise for payment solely in gold coin*

None of these bondholders has offered argument, either in this Court or in the courts below, in support of the assertion that the gold clause in United States bonds is a so-called gold-coin contract, promising payment in specie itself, rather than a gold-value contract. The burden rests upon the

[26] The court spoke of "the Government's contract to pay in gold" (87 F. (2d) at 596), and, again, of the necessity of redemption "in accordance with the promise of the bond, i. e., in gold coin based upon a $25\frac{8}{10}$ grain dollar" (p. 598). There was, however, an alternative argument. See pp. 75–77, *infra*.

plaintiffs of establishing this essential element of their demands. That burden cannot be met. Virtually every court of last resort which in recent years has construed such contracts has regarded them as intended to assure payment of the value of gold and not of gold coin itself. *Feist* v. *Société Intercommunale Belge d'Electricité*, L. R. [1934] A. C. 161, 172, 173; *R.* v. *International Trustee for the Protection of Bondholders Akt.*, [1937] 2 All Eng. L. R. 164; *Case of Serbian Loans*, P. C. I. J., series A, Nos. 20–21, pp. 32–41. Compare *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 296, 302; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 336. There is no reason to suppose that *Perry* v. *United States* stands as an exception.

This Court in the *Perry* case, on the contrary, seems to have been unanimously of the opinion that the gold clause in United States bonds was a gold-value contract, so-called, and not a contract prescribing the method of payment.[27] The bond-

[27] Mr. Justice Stone in his concurring opinion stated (294 U. S. at 358):

"I do not doubt that the gold clause in the Government bonds, like that in the private contracts just considered, calls for payment of value *in money, measured by* a stated number of gold dollars defined in the clause." [Italics supplied.]

Speaking in dissent for himself and three other members of the Court, Mr. Justice McReynolds said (p. 362):

"By the so-called gold clause—promise to pay in "United States gold coin of the present standard of value," or "of or

holders rely wholly upon the opinion delivered by the Chief Justice in that case. The following are all the material parts of the section of the Chief Justice's opinion which discussed "the import of the obligation" (pp. 348, 349):

> The terms of the bonds are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. * * * The circular of the Treasury Department * * * also provided that the principal and interest "are payable in United States gold coin of the present standard of value."
>
> This obligation must be fairly construed. The "*present* standard of value" stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment.

This description of the clause as "setting up a standard or measure of the Government's obligation" leaves no substantial room for doubt that it

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equal to the present standard of weight and fineness"—found in very many private and public obligations, the creditor agrees to accept and the debtor undertakes to return the thing loaned *or its equivalent*." [Italics supplied.]

was construed, like the gold clause in the private bond case (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 298, 302), as a gold-value contract. An interpretation of the clause as requiring payment in specie—"as fixing the mode and not the measure of payment"—had been suggested to the Court by the Government. Brief for the United States, *Perry* v. *United States*, 15. Had the Chief Justice intended to adopt the specie interpretation, he would scarcely have described "the import of the obligation" in terms of measure rather than mode of payment.

It is a well-understood incident of gold-value contracts that their obligation can be satisfied otherwise than by payment in gold coin. This would presumably be true even if gold coin were freely in circulation. Compare *Gregory* v. *Morris*, 96 U. S. 619, 624, 625. It is certainly so when gold coin no longer circulates. Dealing with a contract in which the alternatives of payment in specie or its equivalent in currency were express, and speaking of the first alternative, this Court said recently (*Holyoke Water Power Co.* v. *American Writing Paper Co.*, *supra*, at 336):

> Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold. *Norman* v. *Baltimore & Ohio R. Co.*, *supra*, p. 302; cf. *Feist* v. *Société Intercommunale Belge d'Electricité*, L. R. [1934] A. C. 161, 172, 173. * * *

In the cited case in the House of Lords, Lord Russell of Killowen, speaking of a gold clause in which the alternatives were not express, said (pp. 171–172):

> * * * neither party can have contemplated payment under the bond being actually made in gold coin. * * * I think that * * * the parties are referring to gold coin * * * not as being the mode in which the Company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained.

See also *Case of Serbian Loans, supra; R.* v. *International Trustee for the Protection of Bondholders Akt., supra.* The bonds here in question are similarly contracts for the payment of money. There is no reason to suppose that the bondholders desire to obtain gold coin merely for its intrinsic qualities. None of them is engaged in any business in the operation of which gold is necessary. None of them "can have contemplated payment under the bond being actually made in gold coin", particularly in view of the fact that all of them purchased their bonds when gold coin was no longer in free circulation.

The bonds being gold-value contracts, to allege and prove a failure to pay them in gold coin is wholly insufficient to establish a breach of obligation. It is essential to show also a failure to pay the "equivalent" in value of the gold coin. Such

a showing the bondholders in these proceedings have neither attempted to make nor could make.

The necessity of such a showing—in the view taken by the Chief Justice and the Associate Justices who joined with him—is emphasized by their insistence upon "protection against loss" as an element of the obligation. Manifestly these bondholders have sustained no loss within the meaning of the obligation, as thus interpreted, if they have been tendered the equivalent in value of the gold coin referred to in the bond. The mere fact that actual gold coin has been denied them thus becomes immaterial. The only relevant question is whether they have been caused to "suffer loss through depreciation in the medium of payment," and this question can be answered only by examination of the equivalent which they have been tendered.

2. *The Perry decision does not warrant a conclusion that, under the circumstances presented, the failure of the United States to make payment in gold coin, even if promised, would have constituted a breach of obligation*

The contention of the bondholders, in the aspect now under consideration, amounts at most to a claim of technical breach of contract. Payment of the equivalent of gold coin in legal tender currency would clearly constitute substantial performance even of a contract promising payment in coin itself. This would have been true even before the enactment of the monetary legislation

here involved. It may be assumed, however, that prior to that legislation a refusal to pay in gold coin a bond containing a gold-coin clause would have constituted a technical breach of contract, although such a breach normally would have entitled the bondholder only to nominal damages and, in the case of the United States, would not have been actionable at all. The bondholders insist that a breach of this same character has taken place here.

It is elsewhere pointed out (see pp. 80–87, *infra*) that a merely technical breach of contract would in no event be sufficient to work a forfeiture of the option of redemption. The more fundamental answer, however, is that no such technical breach of obligation here exists.[28] For

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[28] The bondholders attempt to bolster their interpretation of the *Perry* decision as holding the United States to be in at least technical default upon its contract, by reference to the Chief Justice's statement concerning the necessity of proof of actual damages (294 U. S. at 355).

Far from implying that the claimant in that case was entitled to nominal damages, the whole purport of the statement was that the Court of Claims is without jurisdiction to consider such a question. It appears, moreover, from examination of the cases cited by the Court that the real meaning of the rule that the Court of Claims is not constituted to try an action for "nominal damages" is that there is no liability on the part of the Government for action which results in a "taking" of private property unless such "taking" results in pecuniary loss to the owner of the property. *Grant* v. *United States*, 7 Wall. 331, 338; *Marion & Rye Valley Ry.* v. *United States*, 270 U. S. 280, 282; *Nortz* v. *United States*, 294 U. S. 317, 327. The expression "nominal damages," in any event, seems not to have been used in its ordinary sense,

in these cases the reason why the refusal to pay gold coin is not actionable is not merely that the Court of Claims and the district courts are without jurisdiction to award nominal damages against the United States. The further and conclusive reason is that the refusal of the Treasurer to pay gold coin was warranted, and indeed required, by valid legislation enacted by Congress in the exercise of its power to regulate the monetary system. The validity of this legislation was expressly recognized in the prevailing opinions in *Perry* v. *United States, supra.*

Since the claimant himself in the *Perry* case did not question "the right of the Government to discharge its obligation by payment in legal tender currency" (Brief of Claimant, 15, 16), the Court's attention was primarily directed to the question of the amount of such currency to which he was entitled. The opinion delivered by the Chief Justice, in considering that question, however, unmistakably indicated that if the United States had actually committed itself to pay gold coin, valid intervening legislation would have justified the

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i. e., a small sum awarded for the bare infringement of a right unaccompanied by proof of actual loss (1 *Sedgwick on Damages*, 9th ed., secs. 96, 98), for the plaintiff was apparently entitled to judgment in the Court of Claims for $10,000, the face amount of his bond. There was a distinction in this respect between the *Perry* case and the *Nortz* case, *supra.* The plaintiff in the latter case had already been paid the face amount of his certificate in legal tender currency.

refusal of its officers to make such a payment. The opinion stated (pp. 355, 356):

> Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation. The Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange. Acts of March 9, 1933, 48 Stat. 1; January 30, 1934, 48 Stat. 337. Such dealings could be had only for limited purposes and under license. Executive Orders of April 20, 1933, August 28, 1933, and January 15, 1934, Regulations of the Secretary of the Treasury, January 30 and 31, 1934. *That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange.* And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310, 311. [Italics supplied.]

This assertion of the power of the United States to withdraw gold coin from circulation is unequivocal. Such a power necessarily implies the power to refuse to make payment in gold coin, even if promised. The proposition that the United States, although having power to forbid the bondholder to put gold coin to any use save surrender once it has been paid, is without power to refuse to pay it, involves a constitutional absurdity. There is no

justification for an attempt to make the Chief Justice's opinion bear so strained a construction.

The power of the United States "to deal with gold coin as a medium of exchange" would be reduced to a nullity if it did not include the power to refuse to pay such coin, in specie, even where such payment has been promised. The aggregate principal amounts of bonds of the United States containing gold clauses which were outstanding in June 1933 exceeded by a ratio of approximately five to one the aggregate amount of gold in the country.[29] An obligation by the United States to put so much of this gold as it possessed into the hands of its bondholders would have been an obligation to yield over all effective control of the monetary system of the country. Congress has directed that all gold coin of the United States shall be withdrawn from circulation and formed into bars, and has prohibited the future coinage of gold (except coinage for foreign countries) and the payment or delivery of gold coin by the United States. Section 5 of the Gold Reserve Act of 1934, approved January 30, 1934, 48 Stat. 340. In view of the de-

[29] The estimated amount of Federal interest-bearing obligations then outstanding was approximately $21,000,000,000. *Perry* v. *United States*, 294 U. S. at 349. The total gold stocks of the country were reported in Treasury Statement, May 31, 1933, of Money in Circulation as $4,315,380,074, of which $323,881,227 was held outside of the Treasury and the Federal Reserve Banks.

cisions of this Court, an argument that such action by Congress is not a valid exercise of the power to regulate the monetary system (even though it affects the payment of Government gold clause bonds) is frivolous. Compare *Ling Su Fan* v. *United States,* 218 U. S. 302; *Nortz* v. *United States,* 294 U. S. 317; *Holyoke Water Power Co.* v. *American Writing Paper Co., supra,* at 336, 337.

Regarded from the point of view of the power of the United States to borrow money, the hypothesis under consideration is equally baseless. The asserted implication from the power to borrow money—that gold coin, if promised, must be paid—is implied, if implied at all, in order to support the credit of the United States. The credit of the United States would not be supported by the gesture of paying gold coin and then retaking it *instanter.*

"The powers conferred upon the Congress are harmonious," the opinion delivered by the Chief Justice stated (p. 353). The argument now advanced treats them rather as antagonists demanding each other's destruction. Such a construction the Chief Justice's opinion will not bear. Its express recognition of "the authority [of Congress] to deal with gold coin as a medium of exchange" is a recognition also of the authority of Congress to prohibit the payment of gold obligations, public or private, in gold coin. This recognition, indeed, the

opinion did not leave to inference. After stating that "as a remedy for breach, plaintiff can recover no more than the loss he has suffered," it added, *"and of which he may rightfully complain"* (p. 354). The loss of which the plaintiff *could not* rightfully complain the opinion proceeded to state explicitly (p. 357):

> In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to *obtain* gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which Congress had the power to exert, and had exerted, in its monetary regulation.[80]

The argument for these bondholders and the decision of the Circuit Court of Appeals proceed in direct disregard of this unmistakable declaration.

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[80] The only question here important is the power of Congress to prohibit payment of gold coin in specie where the use of gold coin, once paid, is prohibited. The opinion did not consider whether the existence of the power depends on that condition, or what would be the consequence if gold coin of the present standard of weight and fineness were put into circulation. Presumably the bondholder, if entitled to be paid in gold coin at all, would not be entitled to payment based upon the former standard of weight and fineness, for the enrichment which would accrue from such payment would not differ in kind from the enrichment sought by the claimant in the *Perry* case, and denied.

B. THE UNITED STATES IS NOT IN DEFAULT TO THE BONDHOLDERS FOR FAILURE TO PAY THEM A NUMBER OF DOLLARS IN LEGAL TENDER CURRENCY IN EXCESS OF THE FACE AMOUNT OF THE BONDS

The determination in the *Perry* case that Congress has power to protect the nation's physical reserves of gold bullion and gold coin, and to regulate or prohibit dealings therein, was ancillary to the issue there presented—namely, what constituted the equivalent of the gold coin stated in the bond. As before stated (p. 62, *supra*), no corresponding issue appears to be presented in these cases. In confining their claim of default to complaint at the failure of the United States to tender payment in specie, these bondholders thus impliedly recognize, as they must, that the *Perry* decision—at least as to claimants in their position—is conclusive as to what constitutes the equivalent of payment in specie. Because of the gravity of the question, however, and because of certain statements in the opinion of the Circuit Court of Appeals in No. 198, it is important that this second aspect of possible controversy should be discussed.

While insisting upon the obligation of the Government to pay "in gold", the Circuit Court of Appeals stated that "substantial compliance" with that obligation in legal tender currency could only be made by payment of 1.69 dollars for each gold dollar expressed in the bond.

The court declared (R. 28):

> The notice of redemption calling the bond in question for payment was equivalent, therefore, to a notice that the United States elected to redeem the bond in paper currency based on a 15 5/21 grain dollar, notwithstanding that it was payable in gold coin based on a 25 8/10 grain dollar and might be redeemed only at its face value.

Again, it said (R. 32):

> [The Government] is proposing to redeem them [the bonds], not by paying them at that face value, but in paper money *worth only about .59 per cent. thereof.* [Italics supplied.]

These statements are consistent with the views expressed by the dissenting Justices in the *Perry* case but not with the prevailing opinions. The plaintiff in the *Perry* case demanded as "the 'equivalent' in currency of the gold coin promised" (p. 357) precisely the amount which the Circuit Court of Appeals now holds the gold coin to be "worth." This Court, however, held that under the circumstances there presented (which are identical with the circumstances in these cases) such a payment would constitute "not a recoupment of loss in any proper sense but an unjustified enrichment" (p. 358). Obviously this would not have been so if the equivalent to which the bondholder was entitled had been an amount of legal tender currency computed mathematically in accordance with the ratios of the statutory gold content of the

past and present dollars. The *Perry* decision is a flat rejection of such a method of computing equivalence or worth, without regard to actual loss. The opinion delivered by the Chief Justice said (p. 358):

> Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar *he is entitled* to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

So also is the position of the Circuit Court of Appeals untenable.

The factor which was decisive in shaping the Court's conclusion in the *Perry* case, as disclosed in the Chief Justice's opinion, was the maintenance of all forms of money at a parity in the economy of the country, pursuant to the legislation of Congress. After reviewing the Acts of Congress placing restrictions upon transactions in gold coin, and upholding their constitutionality (pp. 355, 356), the opinion said (p. 357):

> In considering what damages, *if any,* the plaintiff has sustained by *the alleged breach* of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin

> which the Congress had the power to exert, and had exerted, in its monetary regulation. * * *.

The opinion was here referring to one phase of the legislation maintaining all forms of money at a parity—the circulation of gold coin, or any other currency, at a premium in foreign or other transactions being, of course, inconsistent with any such legislation. The opinion continued:

> Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time *the alleged breach* occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which "all forms of money" of the United States were to be "maintained at a parity" *had a controlling influence upon the domestic economy.* * * * In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in

> relation to buying power he has sustained any loss whatever. On the contrary, *in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements,* the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment. [Italics supplied.]

The terms of the contracts involved in these cases are identical with those construed by this Court in the *Perry* case. The same monetary restrictions are involved. All forms of money are still maintained at a parity in the economy of the country; and the gold dollars expressed in the bonds could still be used for no purpose for which the dollars tendered to the bondholders are not available. None of the bondholders is engaged, or licensed to engage, in a business in which gold is necessary. These bondholders likewise have not shown or attempted to show that they would have suffered any pecuniary loss as a result of the redemption of their bonds by payment dollar for dollar in legal tender currency. Payment of a greater amount would as surely have resulted in an unjustified enrichment of the bondholders. Here, as in the *Perry* case, therefore, the payment tendered was the precise equivalent of the gold dol-

lars stated in the bonds. If, as clearly appears, the gold clause is a measure-of-value clause, the tender of this equivalent was an exact performance of the obligation of the bonds.[31]

III

A Merely Technical or Prospective Default on the Part of the United States in no Event Would Warrant a Present Forfeiture of the Option of Redemption

The suggestion that the United States, under the prevailing opinions in *Perry* v. *United States,* is in even technical default upon its contract is untenable. Insistence upon this position, however, in no sense implies that establishment of a merely technical breach would suffice to support the bondholders' ultimate contention. Nothing short of a position of material default on the part of the United States would in any event warrant the effort here made to work a forfeiture of the option of redemption.

It has already been shown (pp. 33–36, *supra*) that the contract stated only one express condition upon the occurrence of which interest was to cease. That express condition was the issuance of a notice of call designating a date for redemption, and the

[31] Even if the clause had been construed as a mode-of-payment clause, such a tender would have been at least a substantial performance before the enactment of legislation forbidding payment of gold coin, and after the enactment of such legislation would have been an exact performance. See pp. 68–74, *supra.*

passage of time to that date. If a call for redemption may ever be questioned on the ground of extrinsic circumstances assertedly showing that the obligor does not contemplate a proper performance, assuredly it is so only when the performance contemplated is in a real, as opposed to a technical, sense defective. Any implied condition which might conceivably be read into the contract, supplementing the condition stated by the parties, would similarly be no more than a condition that performance be tendered in substantial compliance with the contract. Compare *Main* v. *Oien*, 47 Minn. 89. For, in either case, the only possible reason for going behind the letter of the call or the contract would be to do justice and avoid hardship.[82]

Not in any view do the prevailing opinions in *Perry* v. *United States* support a contention that the United States is materially in default on its contract. On the contrary, they establish conclusively that the bondholders have been tendered at least the substantial equivalent of the performance due. To sustain the contention now advanced

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[82] Concerning conditions implied in law, Professor Williston comments as follows (3 Williston on Contracts, rev. ed., Section 669):

"Where, however, the law itself has imposed the condition, in absence of or irrespective of the manifested intention of the parties, it can deal with its creation as it pleases, shaping the boundaries of the constructive condition in such a way as to do justice and avoid hardship."

would accordingly avoid no hardship, and, far from doing justice, would confer upon the bondholders—at the cost of grave embarrassment to the management of the public debt—an unmerited premium. (See pp. 83–84, *infra*.)

Taken at its strongest, the case for the bondholders under the opinions in *Perry* v. *United States* comes at most to this: The United States has taken the position that holders of its gold clause bonds are entitled to be paid no more than the face amount of their bonds in legal tender currency. That position under the circumstances now existing has been judicially determined to be correct. Under circumstances undefined, which might arise in the future, it has been intimated that it might be incorrect. 294 U. S. at 350–354. See *ibid*, pp. 359, 360. Compare pp. 87–102, *infra*. The possibility of future invocation of the gold clause by these or other bondholders as a protection against conditions not now existing affords no justification for a present forfeiture of the obligor's option of redemption at the instance of these bondholders, whose demands are clearly for an unjust enrichment.

Provisions for redemption contemplate that the obligor may wish to refund his obligations upon different and, to him, more favorable terms. After the date upon which the bonds became callable, they confer upon him in ordinary course an absolute right to do so. The bondholder, so long

as he is tendered everything to which he is presently entitled, has no greater standing to complain because he is losing a possible future claim under the bonds than because he is losing a return higher than any which upon reinvestment he will be able to obtain. The *Perry* decision conclusively establishes that these bondholders have been tendered everything to which they are presently entitled by virtue of the gold clause.

In effect, indeed, these bondholders are here seeking precisely the premium which they would receive if the United States were permitted to redeem its bonds only upon compensating the holders for the loss of their investment during the balance of the term. By the express terms of the bonds and of Treasury Department Circulars Nos. 78 and 121, pursuant to which the bonds were issued, they were to be paid on redemption before maturity at par and accrued interest—not at the price which the bonds would have been worth if they had not been redeemable. The approximate prices at which the bonds were purchased were 103 (Nos. 42 and 43) and 101 (No. 198).[33] In one case (No. 43), in order (it may be inferred) to obtain a bond upon which suit could be brought without delay, the price paid was in excess of the price (100) at

[33] Payment for such bonds was effected by a New York draft payable in dollars (*Dixie Terminal*), by entering a debit against the bondholders' bank account in a dollar amount equal to the purchase price of the bonds (*Smyth*), and by a check payable in dollars (*Machen*).

which bonds of that series were selling when available in the open market (R. 11). According to the finding in No. 42, if the bond in that case were a valid outstanding interest-bearing obligation of the United States, it would now be worth approximately 110 (R. 19). The bondholders are asking this Court to declare that the bonds are outstanding and drawing interest. It is apparent, therefore, that the bondholders, far from claiming that they would have suffered any loss as a result of the redemption of their bonds dollar for dollar in legal tender currency, are, in effect, demanding an uncontemplated premium.

The suggestion is made on behalf of the bondholders that the only reason why these bonds have been called in advance of maturity is to take advantage of the present inability of the holders to prove that they are entitled to payment otherwise than in the face amount of legal tender dollars (Brief, No. 42, p. 12). As already indicated, if this were the sole motive of the United States in exercising its option to redeem, it would not be an unworthy one. But the suggestion is wholly without foundation, actual or proffered. Since these bonds were issued the conditions of the money market have drastically altered and have altered independently of the monetary legislation of which the bondholders complain. Long-term interest rates are materially lower. The redemption of each of the bonds here involved was part of a refunding

operation designed primarily to take advantage of these conditions. The same thing is true, with a single exception, of every call for redemption of "gold clause" obligations of the United States which has been issued since 1933.[34] Had the Secretary of the Treasury failed to secure for the United States the huge savings in interest thus effected he would have been remiss in the performance of official duty. Manifestly, these savings in interest were the prime motive of the United States in calling these bonds for redemption, and not the

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[34] The exception was the redemption in 1935 of the two per cent Consols and two per cent Panamas. The Treasury Department press release, dated March 9, 1935, for release on March 11, 1935, announcing the contemplated call for redemption of the Consols and Panamas explains the basis for retiring these bonds. They bore the circulation privilege and therefore could be used as security for the issuance of national bank or circulating notes. The press release stated in part:

"The retirement of the two per cent Consols and the two per cent Panama Canal bonds, and the expiration of the temporary authorization for issuance of national bank notes against other bonds will accomplish a simplification of the currency system through the elimination of national bank notes, an action contemplated at the time of the passage of the Federal Reserve Act. More than $500,000,000 of the bonds being called are now on deposit with the Treasurer as security for this type of currency.

"The Federal Reserve Bank notes authorized as emergency currency in the Emergency Banking Act of 1933 are now in process of retirement. National bank notes will be retired as rapidly as they are presented to the Treasury. It is expected that the great majority will be cancelled within a year."

situation created by the decision in *Perry* v. *United States*.[85]

The savings in interest effected by refunding operations in recent years are primarily significant as emphasizing the gravity of the interference with the exercise by the Government of the power to manage the public debt which acceptance of these bondholders' contentions would entail. Enough has already been said concerning the critical importance of the function of callable bonds in public finance (see pp. 21–33, *supra*). The ultimate constitutional reliance of the bondholders is the necessity of maintaining unimpaired the borrowing power of the United States. That power would not be strengthened by the acceptance of the contention of these plaintiffs. On the contrary, to the extent that such a decision would interfere with the sound administration of the public debt, it

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[85] The observation of the petitioners in Nos. 42 and 43 (Pet., No. 42, p. 16; Brief, No. 42, p. 12; Pet., No. 43, pp. 14–15) that "if the Government had to pay the bond in gold, it would never have called the bond" is frivolous. The Government, as the *Perry* case establishes, was not under a duty to pay "in gold." See pp. 61–74, *supra*. What the consequences would have been, had the *Perry* case determined that it was under such a duty, is wholly speculative. The United States might have been compelled to reestablish the former content of the gold dollar. Such action would no doubt have had far-reaching effects upon the economic system of the nation. It would not, however, have spared these bondholders any loss they have actually sustained, for they have not proved that they have sustained any loss. Nor would it have conferred upon them the enrichment they are now seeking.

would tend to restrict the very power which—in the opinion in the *Perry* case upon which the bondholders rely—it was deemed necessary to protect.

IV

The Bondholders Misinterpret the Statements in the Opinion Delivered by the Chief Justice in the Perry Case Reflecting Upon the Constitutionality of the Joint Resolution of June 5, 1933

The contention of the bondholders ignores not only the holding in the *Perry* case, as embodied in the Court's answer to the Court of Claims, but the greater part of the opinion delivered by the Chief Justice in explanation of that holding. Attention is sought to be fixed upon certain statements in the second section of that opinion (pp. 349–354) leading up to the stated conclusion (p. 354) that:

> * * * the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

The Government believes that this statement and the discussion which precedes it are in no event material to the determination of the cases now before the Court. Accordingly, we do not here enter into the extended consideration of the questions involved which their importance would otherwise require. It is appropriate, however, that the Government's position should be stated at least in summary form. We believe that the present plaintiffs

are seriously in error in interpreting the statements in question as a conclusion that subsequent legislation affecting bond contracts must necessarily be unconstitutional. If, however, the bondholders' interpretation be correct, and if the statements as so interpreted have application to the cases at bar, then with deference we submit that the conclusions announced require further consideration here.

The passages in the opinion in question stated the views of only four members of the Court. Mr. Justice Stone, whose concurrence was necessary to make the answer of the Chief Justice and the three Associate Justices the answer of the Court, expressly refrained (pp. 358–361) from intimating an opinion upon any constitutional or other legal question not required by that answer. By the settled doctrine of this Court the statements under consideration do not, therefore, have the force of precedent. *Alaska* v. *Troy*, 258 U. S. 101, 111. Compare *City of New York* v. *Miln*, 8 Pet. 120, *United States* v. *Celeste Macarty et al.*, Archives, December Term, 1851, p. 199. The statements, moreover, were not necessary to the conclusion—as embodied in the answer actually given to the Court of Claims—reached by the Justices who made them. By the settled doctrine of the Court, the statements for this further reason are not of the authority of precedents. *Myers* v. *United States*, 272 U. S. 52, 142; *Liverpool, N. Y. & P. S. S. Co.* v. *Commis-*

sioners of Emigration, 113 U. S. 33, 39. Compare *United States* v. *Hastings,* 296 U. S. 188, 192, 193.

It may be questioned whether the reflections cast upon the constitutionality of the Joint Resolution of June 5, 1933, do not for still a third reason fail to establish any constitutional principle. As before stated (pp. 63–68, *supra*), the opinion delivered by the Chief Justice appears to have construed the bond as a gold value contract "intended to afford protection against loss",[36] and not, as these bondholders assume, as a flat promise to pay in specie gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." Accordingly, the finding ultimately made that the plaintiff had sustained no loss—in the sense in which that term was used throughout the opinion—would appear to be a finding that there had been no infringement of the obligation as originally contracted. In this view, the bond in suit at no time gave rise to any other obligation than to pay the equivalent in money, prevailing in the internal economy in view of ~~as established from time to time by~~ the legislation of Congress, of the gold dollars expressed in the bond. If this be so, the subsequent monetary legislation of the Congress was within the contemplation of the contract. The validity of that legislation apart from its effect

[36] "We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment" (294 U. S. at 348, 349).

upon Government contracts having been settled in *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, and *Nortz* v. *United States*, 294 U. S. 317, no further constitutional question remained to be decided in the *Perry* case. Compare *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *O'Donoghue* v. *United States*, 289 U. S. 516, 550; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627.

The present bondholders, we believe, have gravely misconceived the purport of the second section of the opinion delivered by the Chief Justice. The members of the Court who joined in that opinion understood the Government to contend "that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient" (p. 350). Elaborating the position thus attributed to the Government, the opinion proceeded (*ibid.*):

> The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows

money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. * * *

The entire discussion upon which the bondholders now rely, which follows immediately after this statement of the Government's position, appears to constitute exclusively a refutation of it. The discussion was expressly stated to concern "a question of far greater importance than the particular claim of the plaintiff", and seems, therefore, to have only limited application to that claim. The import of the discussion was that the United States is subject to the obligation of its contracts, whatever that obligation may be; that it is not free to repudiate them, any more than a private individual is free to repudiate his contracts. It follows from this that legislation declaring contracts into which the United States has entered to be "against public policy" and void affords in itself no sufficient defense to a suit upon the contract. If this be the meaning of what was said, the concluding statement concerning the constitutionality of the Joint Resolution signifies only that the short answer of that Resolution to the bondholder's claim was inadmissible, that the United States may not arbitrarily deny the binding quality of its own contracts.[87]

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[87] An argument that the Joint Resolution of June 5, 1933, was a constitutional exercise of the monetary power would plainly go too far to the extent that it implied that the

The Government does not contend "that the Congress can disregard the obligations of the Government at its discretion." It did not wish to be understood as so contending in *Perry* v. *United States*. The Government sought there to defend the applicable legislation of Congress only as a regulation of the currency valid under the circumstances which had been before the Congress and were then before the Court. Its utmost position may be summed up in the language of the opinion under consideration (p. 352):

> When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to

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power to regulate the currency gave the United States the power to disregard its obligations at its discretion. It may be, however, that the Joint Resolution was regarded as invalid, not as an exercise of the monetary power transcending the limits of that power, but as an attempt to deal directly with the obligation of Government contracts presupposing a power over those contracts as such which did not exist. Compare *Lynch* v. *United States*, 292 U. S. 571. In this view a distinction existed between the Joint Resolution and other legislation of the Congress which was valid as an exercise of the monetary power, although it affected indirectly the obligation of Government contracts. Compare the distinction found by this Court to exist between the legislation invalidated in *Coppage* v. *Kansas*, 236 U. S. 1, and *Adair* v. *United States*, 208 U. S. 161, and that sustained in *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 571; and the distinction between the statute found to be invalid in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, and that upheld in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. (preliminary print) 1, 40, 41, 45.

> those of individuals who are parties to such instruments. There is no difference * * *, except that the United States cannot be sued without its consent.

In this view of the meaning of the second section of the opinion delivered by the Chief Justice in the *Perry* case, its correctness as substantive constitutional doctrine, constituting the background of the particular issues there presented, is not questioned. A question does arise only if that section is to be understood as declaring that the United States when it enters into a borrowing contract is in a wholly *different* position from that of an individual; that the obligation of its contracts may not in any fashion be affected by a subsequent exercise of the Federal monetary power.

Such a conclusion may be thought to be suggested in the statement (294 U. S. at 353) that "the right to make binding obligations is a competence attaching to sovereignty." In the sense already discussed (pp. 91–92, *supra*), that contracts of the United States bind the United States as do contracts of individuals, this proposition is undoubted. We do not take it as deciding, however, that a bond of the public debt is executed by the United States in its sovereign capacity. Such a meaning would be at variance with statements of this Court uniformly indicating that governmental promises to pay money are executed by a government in its corporate and proprietary character

and not as sovereign. See *Murray* v. *Charleston*, 96 U. S. 432, 445; *United States* v. *State Bank*, 96 U. S. 30, 36; *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 391, 392. Compare *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 350. Were a Government bond an act of the sovereign, such as a treaty,[38] then by the same token the Court of Claims and this Court would have been without jurisdiction of a suit on the bond, for the United States has never consented to be sued on any matter touching its sovereignty.[39] Compare *Muskrat* v. *United States*, 219 U. S. 346, 361; *United States* v. *State Bank*, 96 U. S. 30, 36; *Tillou's Case*, 1 C. Cls. 220, 221, 222.

The doctrine that the United States as a contractor is entitled to defenses available to private contractors has been unquestioned since the very establishment of the Court of Claims. *Deming's Case*, 1 C. Cls. 190; *Jones' and Brown's Case*, 1 C. Cls. 383, 385; *Wilson's Case*, 11 C. Cls. 513; *Harmon* v. *United States*, 23 C. Cls. 132, 141. Compare *United States* v. *Warren Transp. Co.*, 7 F. (2d) 161, 163 (Mass.). It was approved after full consideration by this Court in *Horowitz* v. *United States*,

[38] Compare Oppenheim, *International Law*, 4th ed., Vol. I, Secs. 493, 494; Hall, *International Law*, 8th ed., Sec. 107; Hyde, *International Law*, Vol. 2, Sec. 489.

[39] Compare Hyde, *International Law*, Vol. I, p. 561; Borchard, *Diplomatic Protection of Citizens Abroad*, Sec. 48; Manton, *Governmental Defaults in Obligations*, 68 U. S. Law Rev. 131, 137.

267 U. S. 458 (1925). More recently this Court in *Lynch* v. *United States,* 292 U. S. 571, 579, expressly recognized that while the due process clause forbids Congress to single out war risk insurance contracts and annul them, a different question would be presented with respect to "action taken * * * within the federal police power or some other paramount power." See also *North American Commercial Co.* v. *United States,* 171 U. S. 110, 137. The principle that governmental action taken in pursuance of sovereign governmental powers for the general good may affect rights arising out of transactions entered into between the Government and private individuals may justly be considered a postulate of American public law. Contracts by the States which, in express terms, bargain away essential governmental powers have long been regarded by this Court as inconsistent with the requirement of constitutional government that powers conferred for the benefit of the whole people should at all times be available to be exercised for the benefit of the whole people. *West Bridge Bridge Co.* v. *Dix,* 6 How. 507, 531; *Butler* v. *Pennsylvania,* 10 How. 402, 416; *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 33; *Newton* v. *Commissioners,* 100 U. S. 548; *Stone* v. *Mississippi,* 101 U. S. 814, 818; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 750–753; *Illinois Cent. R. R.* v. *Illinois,* 146 U. S. 387, 454–456; *Chicago & Alton R. Co.* v. *Tranburger,* 238 U. S. 67, 76–77. But

compare *The Delaware R. R. Tax,* 18 Wall. 206, 226; *Railroad Comm.* v. *Los Angeles Ry. Corp.,* 280 U. S. 145, 152.

This requirement is in no way peculiar to State governments, for it rests not on any supposed inferiority of those governments but on the supremacy of the public interest. It applies with special force to the power conferred upon the Federal Government to provide a sound and uniform currency for the whole nation. The principle in question, far from opening the door to special repudiation by the Government of its own obligations, comes into operation by hypothesis only when Governmental powers are exerted, and validly exerted, by an act of general legislation. Its application in connection with the monetary power is thus attended by a special safeguard because of the necessary generality of an exertion of that power. The principle assumes that the Government's position as a debtor is on a parity, at least, with that of other debtors. In no degree, therefore, is it opposed to the desideratum of constitutional government that governmental action be taken and tested in accordance with law. Rather is it in aid of that desideratum for the enforcement of special contractual limitations—implied or express—upon the exercise of general governmental powers can only tend, in time of stress, to the withdrawal of sovereign consent to suit upon the contracts. Compare 294 U. S. at 360. The assertion of the peti-

tioner in No. 42 (Brief, 15) that the principle exemplified in *Horowitz* v. *United States, supra,* "in the matter of Government bonds was destroyed once and for all in the *Perry* case" would, if correct, be cause for grave concern.

The Government does not believe that the opinion delivered by the Chief Justice in the *Perry* case announces the doctrine that borrowing contracts of the United States may not in any fashion be affected by a subsequent exercise by Congress of the power to regulate the currency. The opinion, on the contrary, expressly stated (p. 353) that "the powers conferred upon the Congress are harmonious." This would not be true if every exercise of the borrowing power nullified, by so much, the monetary power. Whether borrowing contracts of the United States may be affected in every respect identically with private borrowing contracts by subsequent monetary legislation is unnecessary here to consider, as it was unnecessary in the *Perry* case. The doctrine exemplified by *Horowitz* v. *United States, supra,* expresses a general principle of law: that there is a significant distinction between governmental action exerted by way of general legislation, which is of the essence of that for which a government is constituted, and governmental action exerted by way of contract with a private individual. The correctness of the principle need only be submitted to the test of the appropriateness of its application to the particu-

lar case at hand. Every valid contract of the United States is made in pursuance of some power vested in the Federal Government. In such a test, therefore, the relevant inquiry must always be whether the power in aid of which the contract was made will be impaired by recognition that the contract may be affected by a later act of general legislation pursuant to some other power. The opinion of the Chief Justice is concerned with such an inquiry. The effect of that opinion is that, in every respect material in any view to the controversy before the Court, the carrying out of the contract in suit was subjected to the monetary legislation of the Congress.

United States bondholders, the opinion states (p. 357), are not "entitled to obtain gold coin for * * * purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation." This would be so, the opinion makes plain (see pp. 68–74, *supra*), even though such payment had been promised them. Such a case is an indubitably proper one for application of the principle that contracts between the Government and private individuals may be affected by a subsequent exertion of general and paramount governmental power. For a different conclusion would render nugatory "the authority to deal with gold coin as a medium of exchange" (p. 356). And so long as

the bondholder be tendered the equivalent of the promised coin no question exists of impairment of the borrowing power and of the credit of the United States.

The opinion delivered by the Chief Justice clearly indicates, furthermore, that in determining the value in legal tender currency of a stated amount of gold coin account must be taken of the monetary legislation enacted by Congress after the contract was made. This is manifest in the ruling of the opinion that the value of the coin which was determinative was its value in the internal economy of the country, as established by the legislation of Congress. The reasoning upon which this conclusion rests need not turn upon the view that the plaintiff had agreed, as by a term implied in fact in the original contract, to such a valuation. The term, if term it was, must also have been implied in law. For a contract without such a term would amount to a contract granting an exemption from the operation of general monetary legislation. Such an exemption would gravely hamper the exercise of the monetary power outside the purview of the contract. And its allowance would be unnecessary to the support of the borrowing power. Granting that the maintenance of the credit of the United States requires, as, of course, it does, that the borrowing contracts of the Government be fulfilled according to law, it does not require, as an in-

ducement to lending, that particular lenders be exempted from the operation of law, with consequent paralysis of governmental power intended to be exercised for the benefit of all persons. Sovereign powers of government were not conferred upon the Congress for the purpose of being thus bargained away, by contract with private persons, in supposed aid of other governmental powers.

Whether such an exemption would be defensible if it enabled the bondholder to do no more than escape the adverse effects, if any, of general monetary legislation is open to the most serious question. The conclusive reason, however, why such an exemption ought not to be upheld is that it would be impossible thus to confine its effect. So to confine its effect would require means which do not exist, for measuring the purchasing power—in terms of commodities—of the dollars paid the bondholder in comparison with that of the dollars which would have been paid him had no subsequent monetary legislation whatever been enacted. Short of such means, the bondholder would be enabled to claim by the terms of the contract a patently unjustifiable enrichment. This would be true, in all but exceptional circumstances, if the bondholder were permitted to receive an amount in legal tender currency representing the value of the gold coin in markets not legally available to him. It would most clearly and certainly be true, as made plain in the opinion delivered by the Chief Justice, if the gold clause were regarded as a gold value contract providing within itself a measure

of "value" depending arbitrarily upon the ratio between the statutory gold content of the dollar at different times.

Such a contract would enable the bondholder affirmatively to profit by an increase in the "value" of gold coin which, so far as it could be said to exist at all, was the result solely of the exercise by Congress of its monetary powers. The "value" of the gold coin indeed would have no other basis than the mere declaration of Congress with respect to the statutory gold content of the dollar. In the internal economy of the country the gold coin stated in the bonds increased in "value" in terms of legal tender currency, merely because of the reduced statutory content of the dollar, in none but a hypothetical and factitious sense. Had that coin been and remained freely exchangeable for legal tender currency, it would have brought in exchange a greater number of dollars in legal tender currency after devaluation than before. But gold coin in fact was not so exchangeable. There is small ground for supposing that, had it been, the dollar could or would have been devalued. To have regarded the gold coin as having increased in value merely because of the congressional legislation, therefore, would have been to disregard not only the terms of the legislation but the actualities which lay behind its enactment. It would have been to disregard also the actualities which succeeded its enactment. In the markets of the country a dollar in legal tender currency continued to be worth as much to the

bondholder as a dollar in gold coin, whatever its gold content, would have been.

The Government does not believe that the opinion of the Chief Justice in the *Perry* case announces the doctrine that a contract providing for an enrichment of this character must be enforced. The reasons why such an enrichment would be unjustifiable, on the contrary, are set forth in the opinion and form the basis of the decision. Implicit in the decision of the Court in the *Perry* case, under this view of the gold clause, as Mr. Justice Stone pointed out (294 U. S. at 360, 361), is the holding that "the prohibition [of such payment], at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money." To have upheld a claim based upon such a contract would have been incompatible with the constitutional principle, recognized in the opinion delivered by the Chief Justice, which requires that the powers of Congress be so construed as to permit each power to be exercised to the fullest extent consistent with a similar exercise of other powers. It would be doubly incompatible in the cases at bar where the claimed limitation upon the monetary power, if given the effect here sought, would seriously restrict the borrowing power itself in an essential aspect—the power to manage the public debt.

CONCLUSION

It is respectfully submitted that the judgments of the Court of Claims in No. 42 and No. 43 should be affirmed and that the judgment of the Circuit Court of Appeals for the Fourth Circuit in No. 198 should be reversed.

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APPENDIX A

Government stocks and bonds containing redemption provisions

Loan	Date of Maturity	Date of Redeemability
Holland Loan of 1784	January 31, 1801–7 (Annual installments).	January 31, 1801.
Holland Loan of March 1791.	March 1, 1802–6 (Equal annual installments).	Right to redeem the whole at an earlier period.
Holland Loan of September 1791.	1802–6 (Equal annual installments).	Right to redeem the whole at an earlier period.
Antwerp Loan of 1791	1802–6 (Equal annual installments).	Right to redeem the whole or part sooner—no date.
6% Stock of 1790		Yearly payments—not exceeding 8%, on account both of principal and interest.
Deferred 6% Stock of 1790		Yearly payments—not exceeding 8%, on account both of principal and interest.
3% Stock of 1790		Whenever provision should be made therefor by law.
Subscription Loan of 1791	1792–1801 (Equal annual installments).	Sooner or in greater proportions at the option of the Government.
Temporary Loan of 1792		At the pleasure of the United States.
Temporary Loan of 1793		At the pleasure of the United States.
Temporary Loan of March 1794.		At the pleasure of the United States.
Temporary Loan of June 1794.	July 1, 1795	At the pleasure of the United States.
Temporary Loan of March 1795 (A).	January 1, 1797	At the pleasure of the United States after one month's notice.
Temporary Loan of March 1795 (B).		On or before December 31, 1797.
5½% Stock of 1795		At the pleasure of the United States
4½% Stock of 1795		At the pleasure of the United States
Temporary Loan of 1798	January 1, 1803	At the pleasure of the United States after one month's notice.
6% Stock of 1796		At the pleasure of the United States after December 31, 1819.
Navy 6% Stock		At the will of Congress.
8% Loan of 1798		At the pleasure of the United States after 14 years.
8% Loan of 1800		At the pleasure of the United States after 15 years.
Exchanged 6% Stock of 1807.		At the pleasure of the United States after 6 months' notice.
Converted 6% Stock of 1807.		At the pleasure of the United States after 6 months' notice, but not without the assent of the holder until after all the 8%, 4½%, and Exchanged 6% stocks had been redeemed.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
Loan of 1810		On or before December 31, 1811.
6% Loan of 1812		At the pleasure of the United States after December 31, 1824.
Temporary Loan of 1812		Various dates according to contract.
Exchanged 6% Stock of 1812.		At the pleasure of the United States after December 31, 1824.
$16,000,000 Loan of 1813		At the pleasure of the United States after December 31, 1825.
$7,500,000 Loan of 1813		At the pleasure of the United States after January 1, 1826.
$10,000,000 Loan of 1814		At the pleasure of the United States after December 31, 1826.
$6,000,000 Loan of 1814		At the pleasure of the United States after December 31, 1826.
Undesignated Loan of 1814		At the pleasure of the United States after December 31, 1826.
Treasury Note Stock of 1815.		At the pleasure of the United States after December 31, 1824.
7% Stock of 1815		At the pleasure of the United States after December 31, 1824.
6% Loan of 1815		At the pleasure of the United States after December 31, 1827.
5% Loan of 1816		At the pleasure of the United States.
5% Loan of 1820		At the pleasure of the United States after January 1, 1832.
6% Loan of 1820		At the pleasure of the United States.
5% Loan of 1821		At the pleasure of the United States after January 1, 1835.
Exchanged 5% Stock of 1822.		At the pleasure of the United States, after 6 months' public notice, one-third after December 31, 1830, one-third after December 31, 1831, and the remainder after December 31, 1832.
First 4½% Loan of 1824		At the pleasure of the United States after January 1, 1832.
Exchanged 4½% Stock of 1824.		At the pleasure of the United States, after 6 months' public notice, one-half after December 31, 1832, and the remainder after December 31, 1833.
Second 4½% Loan of 1824		At the pleasure of the United States after December 31, 1831.
Exchanged 4½% Stock of 1825.		At the pleasure of the United States, after 6 months' public notice, one-half after December 31, 1828, and the remainder after December 31, 1829.
Loan of 1841		At the pleasure of the United States after December 31, 1844.
Loan of 1842		At the pleasure of the United States after twenty years from December 31, 1842.
Loan of 1843		At the pleasure of the United States after the expiration of ten years after June 30, 1843.
Mexican Indemnity Stock		At the pleasure of the United States at any time after August 9, 1851.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
Loan of 1847		At the pleasure of the United States after December 31, 1867.
Bounty Land Scrip		At the pleasure of the United States.
Loan of 1848		At the pleasure of the United States after July 1, 1868.
Texas Indemnity Stock (1851).		After December 31, 1864.
Loan of 1858		At the pleasure of the United States after the expiration of fifteen years, after January 1, 1859.
Loan of 1860		After January 1, 1871.
Loan of February 1861		At the pleasure of the United States after December 31, 1880.
Oregon War Debt		At any time after July 1, 1881.
Loan of July and August 1861.		At the pleasure of the United States after June 30, 1881.
Five-Twenties of 1862	May 1, 1882	At the pleasure of the United States after April 30, 1867.
Loan of 1863		At the pleasure of the United States after June 30, 1881.
Ten-Forties of 1864	March 1, 1904	At the pleasure of the United States after February 28, 1874.
Five-Twenties of March 1864.	November 1, 1884	At the pleasure of the United States after October 31, 1869.
Five-Twenties of June 1864.	November 1, 1884	At the pleasure of the United States after October 31, 1869.
Five-Twenties of 1865	November 1, 1885	At the pleasure of the United States after October 31, 1870.
Consols of 1865	July 1, 1885	At the pleasure of the United States after July 1, 1870.
Consols of 1867	July 1, 1887	At the pleasure of the United States after July 1, 1872.
Consols of 1868	July 1, 1888	At the pleasure of the United States after July 1, 1873.
5% Loan of 1881 (issued in 1871, 1872, 1874, 1875, 1876, 1877).		At the pleasure of the United States after May 1, 1881.
4½% Loan of 1891 (issued in 1877, 1878, 1879).		At the pleasure of the United States after September 1, 1891.
4% Loan of 1907 (issued in 1878, 1879, 1880).		At the pleasure of the United States after July 1, 1907.
Loan of July 12, 1882		At the pleasure of the United States after all bonds bearing a higher rate of interest which were redeemable had been redeemed or called.
Loan of 1904 (issued in 1894).		At the pleasure of the United States after February 1, 1904.
Loan of 1925 (issued in 1896).		At the pleasure of the United States after February 1, 1925.
Loan of 1908-1918 (issued in 1898).	August 1, 1918	At the pleasure of the United States after August 1, 1908.
2% Consols of 1930 (issued in 1900).		At the pleasure of the United States after April 1, 1930.
2% Panama Canal Loan of 1916-1936.	August 1, 1936	At the pleasure of the United States after ten years from August 1, 1906.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
2% Panama Canal Loan of 1918–1938.	November 1, 1938	At the pleasure of the United States after ten years from November 1, 1908.
2½% Postal Savings Bonds (first series was issued in 1912; total of 49 series was issued).	20 years from date	At the pleasure of the United States on and after one year from date.
First Liberty Loan Bonds of 1932–1947 (First 3½'s, First 4's, First 4¼'s, First-Second 4¼'s) (issued in 1917, 1918).	June 15, 1947	At the pleasure of the United States on or after June 15, 1932, on three months' notice.
Second Liberty Loan Bonds of 1927–1942 (Second 4's, Second 4¼'s) (issued in 1917, 1918).	November 15, 1942	At the pleasure of the United States on and after November 15, 1927, on six months' notice.
Fourth Liberty Loan 4¼% Bonds of 1933–1938 (issued in 1918).	October 15, 1938	At the pleasure of the United States on and after October 15, 1933, on six months' notice.
4¼% Treasury Bonds of 1947–52 (issued in 1922).	October 15, 1952	At the option of the United States on and after October 15, 1947, on four months' notice.
4% Treasury Bonds of 1944–54 (issued in 1924).	December 15, 1954	At the option of the United States on and after December 15, 1944, on four months' notice.
3¾% Treasury Bonds of 1946–56 (issued in 1926).	March 15, 1956	At the option of the United States on and after March 15, 1946, on four months' notice.
3½% Treasury Bonds of 1943–47 (issued in 1927).	June 15, 1947	At the option of the United States on and after June 15, 1943, on four months' notice.
3¼% Treasury Bonds of 1940–43 (issued in 1928).	June 15, 1943	At the option of the United States on and after June 15, 1940, on four months' notice.
3¼% Treasury Bonds of 1941–43 (issued in 1931).	March 15, 1943	At the option of the United States on and after March 15, 1941, on four months' notice.
3½% Treasury Bonds of 1946–49 (issued in 1931).	June 15, 1949	At the option of the United States on and after June 15, 1946, on four months' notice.
3% Treasury Bonds of 1951–55 (issued in 1931).	September 15, 1955	At the option of the United States on and after September 15, 1951, on four months' notice.
3¼% Treasury Bonds of 1943–45 (issued in 1933).	October 15, 1945	At the option of the United States on and after October 15, 1943, on four months' notice.
3¼% Treasury Bonds of 1944–46 (issued in 1934).	April 15, 1946	At the option of the United States on and after April 15, 1944, on four months' notice.
3% Treasury Bonds of 1946–48 (issued in 1934).	June 15, 1948	At the option of the United States on and after June 15, 1946, on four months' notice.
3¼% Treasury Bonds of 1949–52 (issued in 1934).	December 15, 1952	At the option of the United States on and after December 15, 1949, on four months' notice.

Government stocks and bonds containing redemption provisions—Con.

Loan	Date of Maturity	Date of Redeemability
2¾% Treasury Bonds of 1955–60 (issued in 1935).	March 15, 1960	At the option of the United States on and after March 15, 1955, on four months' notice.
2¾% Treasury Bonds of 1945–47 (issued in 1935).	September 15, 1947	At the option of the United States on and after September 15, 1945, on four months' notice.
2¼% Treasury Bonds of 1948–51 (issued in 1936).	March 15, 1951	At the option of the United States on and after March 15, 1948, on four months' notice.
2¼% Treasury Bonds of 1951–54 (issued in 1936).	June 15, 1954	At the option of the United States on and after June 15, 1951, on four months' notice.
2¼% Treasury Bonds of 1956–59 (issued in 1936).	September 15, 1959	At the option of the United States on and after September 15, 1956, on four months' notice.
2½% Treasury Bonds of 1949–53 (issued in 1936).	December 15, 1953	At the option of the United States on and after December 15, 1949, on four months' notice.

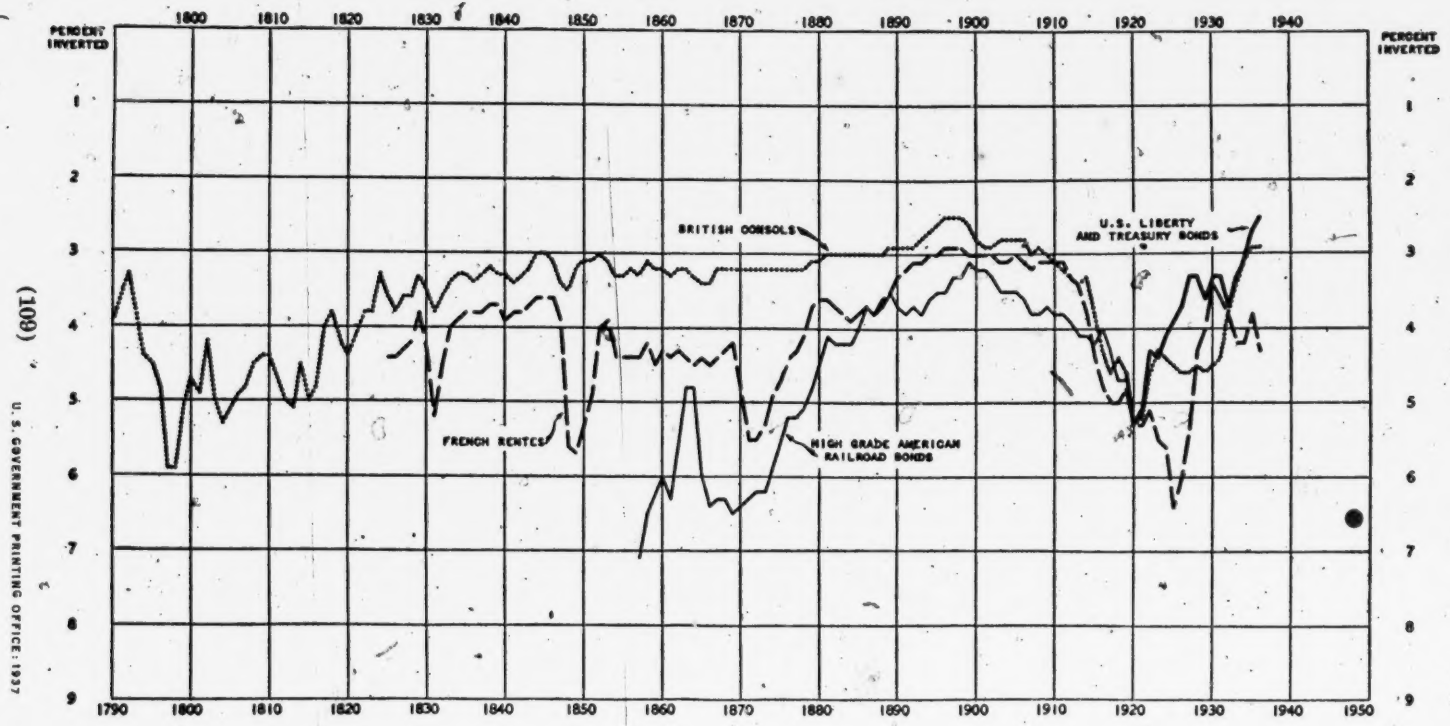
Treasury notes containing redemption provisions

Series	Date of Maturity	Date of Redeemability
Treasury Notes of 1815	----------	At the pleasure of the United States.
Small Treasury Notes of 1815.	----------	At the pleasure of the United States.
Treasury Notes of 1840	1 year after issue	On sixty days' notice.
3¾% and 4¼% Convertible Gold Notes of 1922–1923 (Victory).	May 20, 1923	At the option of the United States on June 15 or December 15, 1922, on four months' notice.
3½% Treasury Notes, Series A—1930–32 (issued in 1927).	March 15, 1932	At the option of the United States on and after March 15, 1930, on six months' notice.
3½% Treasury Notes, Series B—1930–32 (issued in 1927).	September 15, 1932	At the option of the United States on and after September 15, 1930, on six months' notice.
3½% Treasury Notes, Series C—1930–32 (issued in 1928).	December 15, 1932	At the option of the United States on and after December 15, 1930, on six months' notice.

APPENDIX B

YIELDS OF HIGH GRADE BONDS

Annually, 1790 to 1936



See No. 42 for U. S. brief

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 198

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ARTHUR W. MACHEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

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